ESSAYS.

UPON

I. The Law of Evidence.

II New Trials.

III. Special Verdicts.

IV. Trials at Bar.

AND

V. Repleaders.

IN THREE VOLUMES.

By JOHN MORGAN,
OF THE INNER TEMPLE, BARRISTER AT LAW.

VOL. II.

CONTAINING The First VIII. Divisions of the IId. Essay.

LONDON:
PRINTED FOR J. JOHNSON, N°. 72, ST. PAUL'S CHURCH-YARD.
MDCCLXXIX.

GENERAL CONTENTS

OF THE

SECOND AND THIRD VOLUMES.

b. signifies Vol. II. *c.* signifies Vol. III.

 VOL.

VOL. III.

INDEX

TO THE

SECOND AND THIRD VOLUMES.

b. signifies Vol. II. *c.* signifies Vol. III.

A.

Abatement.

Acceptance of a bill of exchange.

Acceptor of a bill of exchange.

Acquittal.

Adding.

Affidavit.

Agent.

Agreement.

Annuity.

Appeal.

Assault.

Assault.

Assumpsit.

Averment.

B.

Banco Regis.

Bankrupt.

As

Bill of Exceptions.

Bills of Exchange. *Vide* NOTICE.

Bill of Lading.

Chancery.

Charters.

Civil Proceedings.

Commercial Transactions.

Commoner.

Common Informer.

Confession.

Construction.

Construction.

Contract.

Copyholders.

Copyhold Fines.

Corporate Act.

Corporations.

Corporator.

Corporator.

Costs.

County.

This

A *new*

Custom.

D.

Damages.

Day.

Default.

Defendant.

Demurrer.

Deposition.

Discharge.

Discretion.

Disfranchisement.

Distringas.

Diversity.

E.

Ejectment.

Estoppel.

Evidence.

Executor.

Extent.

Extortion.

F.

Factors.

Faculty.

Fictions.

Fine.

Foreign Laws.

H.

Imprisonment.

Indorsement.

Infant.

Inferior Courts.

Information.

Page

Inter-

Interlocutory Judgment.

Joinder of Action.

Issue.

Issues.

Judge.

permitting

Judgment.

Jurors.

Jury.

Lending Money.

London.

M.

Malicious Prosecution.

Mandamus.

Marriage.

Misbehaviour.

Mis-

Misspleading.

Mistakes.

Mis-trial. *Vide* c. 1, &c.

Modus.

Murder.

N.

Non-suits, Non-prosses, &c.

Notice.

O.

Outlawry.

P.

Palatine.

Patent.

Payment.

Personal Actions.

Pew.

Place.

Plea.

Pleading.

Policy of Insurance.

Postea.

Practice. *Vide* - *c.* 66

Presumption.

R.

Recital.

Scan-

Scandalum Magnatum.

Scire facias.

Secta ad Molendinum.

Seisin.

Seniori puero.

Set-off.

Smuggling.

Stake-holder.

Stamps.

Surrender.

Time.

Trespass.

Trial.

Trial at Bar.

Trover.

Tythes.

Tythes.

V.

Variance.

Action

To

Verdict.

Way.

Welch Drovers.

Will.

Withdrawing of Pleas, &c.

Witness.

TABLE

T A B L E

OF THE

NAMES of the CASES in ESSAY II, III, IV, and V.

b. signifies Vol. II. *c.* signifies Vol. III.

A.

B.

B.

Goodman

Huggens

Rackham

R.

S.

T.

V.

U.

W.

Watts

Y.

ESSAY



ESSAY II.

Of New Trials.

INTRODUCTION.

THE causes of *suspending* judgment, after a verdict given, by granting a *new trial*, are at present wholly *extrinsic*, arising from a matter foreign to or *dehors* the record. They are in general,

Bl. Com. l. iii. c. 24.

I. Misbehaviour of a party towards the jury.

II. A verdict obtained by fraud, stratagem, or unequitable means.

III. Gross misbehaviour of the jury.

IV. A verdict contrary to evidence, or an hard action, &c.

V. A verdict against the record, or against law.

VI. For excessive damages.

VII. For insufficient damages.

VIII. For refusing evidence by, or misdirection or nondirection of the judge.

IX. And other causes, as irregularity, &c.

For these, and other reasons of the like kind, it is the practice of the court to award a *new*,

or second *trial*. But if two juries agree in the same or a similar verdict, a third trial is *seldom* * awarded: for the law will not readily suppose, that the verdict of any one subsequent jury can countervail the oaths of the two preceding ones.

6 Mod. 22. Salk. 649.

* But sometimes hath been, as may be seen hereafter.

Yet this is sometimes done, where matter of *law* is blended with the question of *fact*, and it clearly appears to the court, that the jury have mistaken the law.

Vide Tyndal and others v. Brown. B. R. 1786, 7. Post V.

The exertion of these superintendent powers of the king's courts, in setting aside the verdict of a jury and granting a new trial, on account of misbehaviour in juries, is of a date extremely antient.

There are instances in the year books of the reigns of *Edw. III. Hen. IV.* and *Hen. VII.* of judgment's being stayed, (even after trials at bar,) and new *venires* awarded, because the jury had eat and drank without consent of the judge, and because the plaintiff had privately given a paper to a juryman before he was sworn. And upon these Chief justice *Glynn*, in 1655, grounded the first precedent that is reported in our books for granting a new trial upon account of *excessive damages* given by the jury: apprehending, with reason, that notorious partiality in the jurors, was a principal species of misbehaviour.

24 Ed. III. 24. Bro. ab. t. verdite 17. 11 Hen. IV. 18. Bro. ab. t. enquest 75. 14 Hen. VII. 1. Bro. ab. t. verdite 18. Vide Post.

Styl. 466. Vide Post.

A few years before, a practice took rise in the common-pleas, of granting new trials upon the mere certificate of the judge, (unfortified by any report of the evidence,) that the verdict had passed against his opinion; though Chief justice *Rolle* (who allowed of new trials, in cases of misbehaviour, surprise, or fraud; or if the verdict was notoriously

Styl. 138.

contrary

contrary to evidence) refused to adopt that practice in the king's-bench.

1 Sid. 235. Styl. pract. Reg. 310, 311. edit. 1657.

At that time it was clearly held for law, that whatever matter was of force to avoid a verdict, ought to be returned upon the *postea*, and not merely surmised to the court; lest posterity should wonder why a new *venire* was awarded, without any sufficient reason appearing upon the record.

Cro. El. 616. Palm. 325. 1 Brownl. 207.

But very early in the reign of *Charles II.* new trials were granted upon *affidavits*; and the former strictness of the courts of law, in respect of new trials, having driven many parties into courts of equity, to be relieved from oppressive verdicts, they are now more liberal in granting them: the maxim at present adopted being this, that (in all cases of moment) where justice is not done upon one trial, the injured party is entitled to another.

1 Sid. 235. 2 Lev. 140.

1 Burr. 395.

Formerly the only remedy, for reversal of a verdict unduly given, was by writ of *attaint*, and which is, at least, as old as the institution of the grand assise by *Hen. II.* * in lieu of the *Norman* trial by battel.

* Ipsi regali institutioni eleganter inserta. (Glanv. l. ii. c. 19.)

Such a sanction was probably thought necessary, when, instead of appealing to Providence for the decision of a dubious right, it was referred to the oath of fallible, or, perhaps, corrupted men. Our ancestors saw, that a jury might give an erroneous verdict; and, if they did, that it ought not finally to conclude the question in the first instance: but the remedy which they provided, shews the ignorance and ferocity of the times, and the simplicity of the points then usually litigated in our courts of justice. They supposed that, the law being told to the jury by the judge, the proof of fact must be always so clear, that,

if they found a wrong verdict, they must be wilfully and corruptly perjured, whereas a juror may find a just verdict from unrighteous motives, which can only be known to the great searcher of hearts: and he may, on the contrary, find a verdict very manifestly wrong, without any bad motive, from inexperience in business, incapacity, misapprehension, inattention to circumstances, and a thousand other innocent causes. But such a remedy as this, laid the injured party under an insuperable hardship, by making a conviction of the jurors for perjury, the condition of his redress.

The judges saw this; and very early, even for the misbehaviour of jurymen, instead of prosecuting the writ of *attaint*, awarded a second trial: and subsequent resolutions, for more than a century past, have so extended the benefit of this remedy, that the *attaint* is now as obsolete as the trial by battel which it succeeded: and we shall probably see the revival of the one, as soon as the revival of the other.

And here we may admire * the wisdom of suffering time to bring to perfection new remedies, more easy and beneficial to the subject; which, by degrees, from the experience and approbation of the people, supersede the necessity or desire of using or continuing the old.

* Vide Bl. Com. l. iii. c. 17.

If every verdict was final in the first instance, it would tend to destroy this valuable method of trial, and would drive away all causes of consequence from the courts of common law, to be decided according to the forms of the imperial law; upon depositions in writing; which might be reviewed in a course of appeal. Causes of great importance, titles to land, and large questions of commercial

mercial property, come often to be tried by a jury, merely upon the general iſſue: where the facts are complicated and intricate, the evidence of great length and variety, and ſometimes contradicting each other; and where the nature of the diſpute very frequently introduces nice queſtions and ſubtilties of law. Either party may be ſurpriſed by a piece of evidence, which (had he known of its production) he could have explained or anſwered; or may be puzzled by a legal doubt, which a little recollection would have ſolved. In the hurry of a trial the ableſt judge may miſtake the law, and miſdirect the jury: he may not be able ſo to ſtate and range the evidence as to lay it clearly before them; nor to take off the impreſſions which have been artfully made on their minds by learned and experienced advocates. The jury are to give their opinion *inſtanter*; that is, before they ſeparate, eat, or drink. And under theſe circumſtances the moſt intelligent and beſt intentioned men, may bring in a verdict, which they themſelves, upon cool deliberation, would wiſh to reverſe.

Next to doing right, the great object, in the adminiſtration of public juſtice, ſhould be to give public ſatisfaction. If the verdict be liable to many objections and doubts in the opinion of the party's counſel, or even in the opinion of by-ſtanders, no perſon would go away ſatisfied, unleſs he had a proſpect of having it reviewed. Such doubts would with him be deciſive: he would arraign the determination as manifeſtly unjuſt; and abhor a tribunal which he imagined had done him an injury, without a poſſibility of redreſs.

Granting a new trial, under proper regulations, cures all theſe inconveniencies, and at

 the

the ſame time preſerves intire and renders perfect, that moſt excellent method of deciſion, which is the glory of the Engliſh law. A new trial is a rehearing of the cauſe before another jury; but with as little prejudice to either party, as if it had never been heard before. No advantage is taken of the former verdict on the one ſide, or the rule of court for awarding ſuch ſecond trial on the other: and the ſubſequent verdict, though contrary to the firſt, doth not impute any blame to the former jury; who, had they poſſeſſed the ſame lights and advantages, would probably have been of a different opinion. The parties come better informed, the counſel better prepared, the law is more fully underſtood, the judge is more maſter of the ſubject; and nothing is now tried but the real merits of the caſe.

A ſufficient ground muſt however be laid before the court, to ſatisfy them that it is neceſſary, for the ſake of juſtice, that the cauſe ſhould be farther conſidered. If the matter be ſuch as did not or could not appear to the judge who preſided at *niſi prius*, it is diſcloſed to the court by *affidavit*: if it ariſes from what paſſed at the trial, it is taken from the judge's information; who uſually makes a ſpecial and minute report of the evidence. Counſel are heard on both ſides to impeach or eſtabliſh the verdict, and the court give their reaſons at large, why a new examination ought or ought not to be allowed. The true import of the evidence is duly weighed, falſe colours are taken off, and all points of law which aroſe at the trial are, upon full deliberation, clearly explained and ſettled.

Nor do the courts lend too eaſy an ear to every application for a review of the former verdict.

verdict. They must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the truth and justice of the case. A new trial is not granted, where the value is too inconsiderable to merit a second examination. It is not granted upon nice and formal objections, which do not go to the real merits. It is not granted in cases of strict right or *summum jus*, where the rigorous exaction of extreme legal justice is hardly reconcileable to conscience. Nor is it granted where the scales of evidence hang nearly equal: that, which leans against the former verdict, ought always very strongly to preponderate.

In granting such farther trial, (which is matter of sound discretion,) the court hath also an opportunity, which it seldom fails to improve, of supplying several defects * in this mode of trial, by laying the party applying under all such equitable terms, as his antagonist shall desire and mutually offer to comply with: such as the discovery of some facts upon oath; the admission of others, not intended to be litigated; the production of books, deeds, and papers; the examination of witnesses, infirm or going beyond sea; and the like. And the delay and expence of this proceeding are so small and trifling, that it seldom can be moved for to gain time, or gratify humour. If the cause is tried in term time, it must be moved for in four days; if tried in the vacation, within the first four days of the next succeeding term, within which term it is usually heard and decided. And it is worthy observation, how infinitely superior to all others the trial by jury approves itself,

* V. 3 Bl. Com. l. iii. c. 23.

 even

even in the very mode of its revision. In every country of *Europe*, and in those of our own tribunals which conform themselves to the process of the civil law, the parties are at liberty, whenever they please, to appeal from day to day, and from court to court, upon questions merely of fact; which is a perpetual course of obstinate chicane, delay, and expensive litigation *. With us no new trial is allowed, unless there be a manifest mistake, and the subject matter be worthy of interposition. The party who thinks himself aggrieved may still, if he pleases, have recourse to his writ of *attaint* after judgment; in the course of the trial he may *demur* to the evidence, or tender a *bill of exceptions*. And, if the first is totally laid aside, and the other two very seldom put in practice, it is, because long experience hath shewn, that a motion for a second trial is the shortest, cheapest, and most effectual cure for all imperfections in the verdict; whether they arise from the mistakes of the parties themselves, of their counsel, or attornies, or even of the judge or jury.

Bl. Com. l. iv. c. 27.

In criminal cases which touch life or member, the jury must give an *open* verdict, which may be either general, guilty, or not guilty; or special, setting forth all the circum-

Bl. Com. l. iii. c. 24. p. 392. n.

* Not many years ago, an appeal was brought to the House of Lords from the Court of Session in *Scotland*, in a case between *Napier* and *Macfarlane*. It was instituted in *March* 1745; and, (after many interlocutory orders and sentences below, appealed from and reheard as far as the course of proceedings would admit,) was finally determined in *April* 1749: the question being only as to the property of an Ox, adjudged to be of the value of three guineas. No pique or spirit could have made such a cause, in the court of *King's-Bench* or *Common-Pleas*, have lasted a tenth of the time, or have cost a twentieth part of the expence.

stances

ſtances of the caſe, and praying the judgment of the court, whether, for inſtance, on the facts ſtated, it be murder, manſlaughter, or no crime at all.

This is where they *doubt* the matter of law, and therefore *chuſe* to leave it to the determination of the court, though they have an unqueſtionable right of determining upon all the circumſtances, and finding a general verdict, if they think proper ſo to hazard a breach of their oaths: and if their verdict be notoriouſly wrong, they may be puniſhed and the verdict be ſet aſide by *attaint* at the ſuit of the king; but not at the ſuit of the priſoner. But the practice, heretofore in uſe, of fining, impriſoning, or otherwiſe puniſhing jurors, merely at the diſcretion of the court, for finding their verdict contrary to the direction of the judge, was arbitrary, unconſtitutional, and illegal; and is treated as ſuch by Sir *Thomas Smith*, two hundred years ago; who accounted "ſuch doings to be very violent, "tyrannical, and contrary to the liberty and "cuſtom of the realm of *England*;" for, as Sir *Matthew Hale* well obſerves, it would be a moſt unhappy caſe for the judge himſelf, if the priſoner's fate depended upon his directions:—unhappy alſo for the priſoner; for, if the judge's opinion muſt rule the verdict, the trial by jury would be uſeleſs.

2 Hal. P. C. 310.

Smith's Comonw. l. 3. c. 1.

2 Hal. P. C. 313.

Yet in many inſtances, where contrary to evidence the jury have found the priſoner guilty, their verdict hath been mercifully ſet aſide, and a new trial granted by the court of king's-bench; for, in ſuch caſe, it cannot be ſet right by *attaint*.

1 Lev. 9. T. Jones 163. St. Tr. X. 416.

Mr. J. *Blackſtone* citing the authority in the margin ſays, there hath yet been no inſtance of

2 Hawk. P. C. 442.

of granting a new trial, where the prisoner was *acquitted.* And it is right, upon all the grounds of which Mr. J. *Blackstone* has treated. —But in a case of misdemeanor, where the defendant hath the making up the record, and consequently giving notice of trial; there it ought to be otherwise, if the prosecutor is surprised; as, where a person very lately indicted for *perjury*, was acquitted: a new trial was moved for, and on behalf of the prosecution, it was insisted, proper notice of trial had not been given. The court entertained the motion, and the defendant finding the point could not easily be cleared up, to the satisfaction of the court, consented to a new trial, and was a second time acquitted; but had he not consented, I doubt not but the court would have granted a new trial, if not fully convinced the notice was not proper; and this gives me an opportunity of saying, I think in such a case as that of perjury, it is very absurd, to permit the defendant to make up the record for trial; for though the effects of gross misconduct may be remedied, yet it may be attended with such trouble and expence, as to render the remedy worse, if possible, than the disease: besides, few have property sufficient, and probably fewer have inclination, to make the attempt, and persevere in it. Why therefore, not pursue the same mode, as in the case of felonies? An additional reason may be assigned, in every case of misdemeanor, where a defendant is compelled to make up the record: if he is innocent, it is punishing him before trial, without the least pretence, contrary to the first principles of justice and equity.

We now proceed to the particular heads, stated in the first page.

I. Misbehaviour of a Party towards the Jury, &c.

Vide III. Goodman v. Cotherington.

The plaintiff in *assise* delivered an *escrow* to one of the jury empanelled, as evidence on his part, and afterwards the same juror (with others) was sworn, and they were put into an house to agree upon their verdict: the juror first mentioned, shewed the *escrow* to his companions, and the officer, who kept the enquest, mentioned this matter to the court; upon which the justices took the *escrow* from the jurors, and received their verdict, and enquiry was made of the jurors, as to the time of the delivery of the *escrow*, and it was found *ut supra*, and because the verdict passed for the plaintiff, he now prayed his judgment. *Gasc.* and *Hulls* said, that the jury after they are sworn, ought not to have seen or taken with them any other evidence, but what was delivered to them by the court, and by the party produced in court upon the evidence given; and inasmuch as they had done contrary, it was suspicious, and therefore the plaintiff ought not to have judgment. And afterwards the plaintiff said that the *escrow* was proved in evidence, and that he gave it to them at the bar, therefore he had not done so ill, as if it had not appeared in evidence, *sed non allocatur*, &c.

M. 11 H. IV. 17, 18. Bro. Ab. tit. Enquest, 75. Cause of staying judgment after verdict. Fitzh. tit. Enquest, 37. Plaintiff delivers an escrow to one of the jurors.

The

Metcalfe v. Deane, T. 32 Eliz. B. R. Cro. Eliz. 189. One of the witnesses examined by the jury after they went from the bar.

The jury being gone from the bar to confer of their verdict, one of the witnesses that was before sworn on the part of *Deane*, was called by the jurors; and he recited again his evidence to them, and after they gave their verdict for *D*. And complaint being made to the judge of the assises of this misdemeanor, he examined the enquest, who confessed all the matter, adding that the evidence was the same in effect, that was given before *et non alia nec diversa*, and this matter being returned upon the *postea*, the opinion of the court was, that the verdict was not good, and a *venire fac' de novo* was awarded, v. 35 *H*. 6. *examination* 17. 11 *H*. 4. 17. and *Brownlow* cited a precedent *inter Leming* and *Kempe* accordingly. *Vide the next case.*

Heyler v. Hall, M. 20 Jac. B. R. Palmer 325. Evidence given after the direction of the court to the jury. Bankrupt.

In *ejectment*, the parties were at issue as to the day one *Pratt* became *bankrupt*; and it was agreed,

1. That if one *keep* within his house for a long time, this does not immediately make him *bankrupt*; but if he *conceal* himself in his house for a day, or for an hour, to delay or defraud his creditors, this makes him a *bankrupt* within the statute.

2. It was agreed that if one be surety for another and conceal himself, he is a *bankrupt* within the statute.

3. It was agreed, that if one exercise trade, and then becomes indebted, and after quits his trade, and lives in the country without any trade, but upon his lands, and *conceals* himself from his creditors, yet he is a *bankrupt*, because he lived by his trade, when the debt accrued.

4. It was agreed that if one for a time carry on trade, as *Pratt* did, who was a *felt-maker*,

2 and

and after he quit his trade, but leaves his ſtock in the hands of another, and the former receive part of the profits of the other, and is alſo partaker of the loſs, if after ſuch quitting trade he becomes in debt and conceals himſelf from his creditors, that he ſhall be ſaid to be a *bankrupt* within the ſtatute; and all this was agreed, upon giving evidence to the jury in *B. R.* and *after evidence given*, and the *direction* of the *court*, the plaintiff's ſolicitor delivered to the jury, in the face of the court (but this was not obſerved) as they were departing from the bar, the depoſitions of *Pratt* taken in *Chancery*, which by his own confeſſion proved him a *bankrupt* at the time pretended by the plaintiff; (but theſe depoſitions had before been read unto them in court;) they afterwards returned, and were ready to give a verdict for the plaintiff; but the other party by his counſel ſhewed this to the court, and the jury were examined each of them upon oath, if more was read to them after their departure, than was read to them in open court; and they agreed, that there was not. 2. They were aſked, how they were inclined to give their verdict, before they read the depoſitions; and ſome ſaid, that they were inclined to find for one, and others, for the other; and upon this the ſolicitor was committed for his miſdemeanor, and the verdict taken *de bene eſſe*; and the officer of the court was commanded to make a record of all this matter after the verdict.

Evidence after the direction of the court.

But it was moved by ſerjeant *Hitcham*, that it was not neceſſary to make a record of this, becauſe in the ſame court, and all that is done in the ſame court, is in the breaſt of the juſtices during this term; otherwiſe if ſuch matter

matter happen at *nisi prius*, there the justices ought to certify it of record upon the *postea*, at the day in bank. But the whole court against him, that a record ought to be made of it in this court also; and they would not dispute the law upon the point, until it was recorded; because the verdict is of record for the plaintiff, and that ought to be matter of record, which should vitiate it; and afterwards *Hitcham* argued, that the verdict ought to be quashed, evidence having been received after the direction of the court to the jury; and for this he cited 35 *H. VI. examination* 17. 11 *H. IV.* 17 *et* 78. as where they eat and drink, 14 *H. VII.* and for this he relied upon the case of one *Metcalfe*, T. 31 and 32 *Eliz.* in *B. C.* where the jury after their departure from the bar sent for a witness, who had before been examined in court, and examined him, who gave the *same* testimony, and no more than he had done in open court before; and for this reason *Anderson Chief Justice of B. C.* was of opinion, that such examination did not vitiate the verdict; but against his opinion it was adjudged by the three other justices, that the verdict should be quashed for two causes. 1. Because the jurors might not think of the answers, which counsel on the other part would apply to this evidence, if it had been again given in court. 2. Because perhaps upon this the court would have given another direction; and all this being returned upon the *postea*, the record saith, that *licet easdem evedentias dedit*, the verdict was quashed, and a *venire facias de novo* awarded; and according to the case of *Metcalfe* it was said, that the same matter was adjudged afterwards in

Vide ante.

in *C. B.* Alſo *Paſ.* 34 *Eliz.* between *Fleminge* and *Webb.*

Snell v. Timbrell, M. 12 G. I. 1 Stra. 643. Labouring a juror.

On a motion for a new trial, it was held, that deſiring a juror to appear in his cauſe, which was between a miller and a baker, was no ground to ſet aſide the verdict. And the court remembered the caſe of the duke of *Leeds*, who wrote a letter to a juror, deſiring him to attend, and you will oblige your humble ſervant *Leeds*; which was thought no reaſon to ſet the verdict aſide.

II. A Verdict obtained by Fraud, Stratagem, or unequitable Means.

Anderſon v. George, E. 30 G. II. B. R. 1 Burr. 352. Action for goods ſold; verdict for plaintiff, who had taken a note upon H. and indulged him with time for payment.

" Upon a rule for the plaintiff to ſhew cauſe " why a verdict obtained by him for 16 l. " ſhould not be ſet aſide, and a new trial or- " dered, *upon payment of coſts*,"

The caſe appeared to be, that the plaintiff had ſold goods to the defendant, who paid for them by a promiſſory note of one *Hopley*, which the defendant indorſed. The plaintiff demanded the money of *Hopley*, but indulged him with farther day of payment ſeveral times, till *Hopley* broke.

The only diſpute between the two parties was, " which of them ought to bear the loſs " of this note." For the plaintiff was paid, if the loſs ought to fall upon him, through his neglect or indulgence in giving further credit to *Hopley*.

There were *two counts* in the declaration: one, for *goods ſold*, the other, againſt the defendant as indorſer of the promiſſory *note*.

When the cauſe came on to be tried, though both parties came to try the *real merits* of the queſtion between them, *viz.* " *which* ſhould " bear the loſs of the *note*, occaſioned by " *Hopley*'s failure;" and the plaintiff's agents had the *note in court*; yet finding upon their own evidence, " that the plaintiff had given " repeatedly further credit to *Hopley*," they

reſorted

resorted to a TRICK, and rested their case upon proving the sale and delivery of the *goods*, which was never disputed. The defendant could not produce the note: it was in the plaintiff's custody. Relying upon it's being the only ground of the plaintiff's case, the defendant had not given him NOTICE "*to produce it.*" The count, stating it, could not be given in evidence: and the defendant had not intitled himself to prove the contents, for want of notice to produce it. LORD MANSFIELD told them, at the trial, it was an improper artifice; that no verdict could stand, which was so obtained. But the plaintiff *refused to produce the note*, and had a verdict, of course.

It was now contended, for the plaintiff, that the verdict was *regular*, and the plaintiff in *no fault*: for, without notice, he was *not obliged to produce* the note. Therefore the verdict ought not to be set aside.

The court thought the plaintiff had taken an *unfair* advantage, *contrary to justice and good conscience*. That the rules of practice must be *general*: but he who abused them in a particular case, should not shelter a *trick*, by *regularity*. The plaintiff did not want notice to produce a note he *had in court*, and which he had laid in the declaration as his *ground of action*.

Besides, he took a verdict for the price of the goods, *though* he had *received satisfaction*, the evidence of which was in his own custody and *suppressed*.

They not only set aside the verdict, but set it aside WITHOUT *payment of costs*: and declared, "the next time that a party should "obtain a verdict in like manner, by an *un-*

" *fair, unconscionable* advantage, without trying
" the real question, they would set aside the
" verdict, and make *him pay the costs*."

A new trial being ordered, this cause was tried at *Guildhall*, the sittings after this term; and the *defendant* had a verdict upon the *merits*, to the satisfaction of every body; the case being clear, beyond a doubt.

III. Gross Misbehaviour of the Jury, &c.

Vide Post vi. *Ash* v. Lady *Ash*; *et* ix. (12.)

(*a.*) The *King* v. Lord *Fitzwater.*

Nisi prius in *replevin* in *Essex.*

The jury were sworn and committed to the care of the sheriff, and when the justices would have taken the verdict, certain persons deposed, that victuals and drink were brought to the jurors, after their charge, and that they were suffered to go out, for which reason the justices refused to take their verdict, because it was suspicious; and complaint was made of this to the king, by bill, which he indorsed to the justices of *Banco Regis*, to do right and reason; and the under-sheriff by his servant, confessed that he permitted them to go at large, and because this appeared of record, *ss.* his misdemeanor, and he was an officer, a *capias* was awarded against him: and because their going at large, and victuals and drink being carried to them, was only a surmise, a *venire facias* was awarded against the jury, and the trespassers, and between the parties a *venire facias de novo* was awarded.

Bro. ab. tit. verd[t]. 17. 24 Ed. III. 24.

Victuals and drink brought to the jurors after their charge, and they were suffered to go out.

As to the jurors eating and drinking, vide post IX. (18)

In the common bench, the jury charged, found for the plaintiff, and the defendant prayed a *venire facias de novo*, because the jury had taken victuals and drink, between their charge, and the verdict given: and the

Bro. ab. tit. verd[t]. 18. 14 H. VII. 1.

Jury eating and drinking between charge and verdict.

verdict was adjudged *void*, and a new *venire* awarded.

Goodman v. Cotherington, M. 16 Car. II. B. R. 1 Sid. 235. 1 K. 824. Litt. Rep. 69. 2 Ro. 715. pl. 16. Stiles 383. Co. Lit. 227. Palm. 325. Mo. 452. Where the miscarriage of jurors shall avoid the verdict. One of the jury went from his companions, and then returned, brought a court-roll with him, and said he knew the matter, and was for the plaintiff, and the rest of the jury submitted, tho' before of a contrary opinion.

A new trial was moved for upon several affidavits that at the last *Gloucester* assises the jury being charged with an issue concerning a copyhold, after they had heard the evidence, and when they had departed from the bar, one of them went from his companions and then returned to them, and brought a court-roll with him, and said that he knew the matter and was for the plaintiff; and then, altho' the rest of the jurors thought otherwise before, they submitted to this juror, and found for the plaintiff: and the court, for this misbehaviour, awarded a new trial. And in Lord *Shande*'s case, in the time of *Roll*, chief justice, after a *trial* at *bar*, a new trial was granted, because the plaintiff had delivered a paper to the jurors, after they departed from the bar.

How the court takes notice of it.

But *Twisden* justice said that in case of such misbehaviour *in pais*, no notice should be taken of it upon affidavits, unless it was indorsed upon the *postea*, and so it is held in *Cro.* 3. 189. *pl.* 17. 411. 626. *Vide Introd.*

Hall v. Vaughan H. 37 Eliz. rot. 21. Mo. 599. No. 825. Jury eating and drinking at their own charge, after charge, and before verdict.

The jurors eat and drank at their *own* costs before verdict, and after their departure from the bar. And this was certified upon the *postea*, yet the verdict was held not to be void, but that the jurors were fineable. It seems otherwise if at the costs of either of the parties.

M. 2 Eliz. Mo. 17. No. 63.

Nota per all the justices, that after a verdict given, a man shall never say in arrest of judgment, that the jurors have had victuals and drink between their departure from the bar, and the giving of their verdict; but it ought to be alledged before the verdict is given.

In

In arrest of judgment after verdict, it was alledged that a juror delivered to his companions an *escrow* for evidence, which was not given in evidence at the trial, and adjudged no cause to arrest the judgment, unless it had been received from one of the parties, or the other, which did not appear.

Drove v. Short, H. 40 Eliz. rot. 733. Mo. 546. No. 728.
A juror delivers an escrow to his companions, not given in evidence.

Error of a judgment in the common-bench, in a *formedon*. The errors assigned were: the first in *fait*; that the parties being at issue, whether a feoffment were made, *&c*, and the jurors at *nisi prius*, being gone together to confer, *&c*. *William Malevory*, one of the jurors, shewed to the other jurors an *escrow* in writing, *pro petentibus quod non fuit dat.* in evidence *per partes prædictas, per quod*, they found a verdict for the demandant.

Graves v. Short, M. 40, 41 Eliz. H. 40 Eliz. rot. 847. Cro. Eliz. 616.

Error in fact, one of the jurors delivering an escrow to his companions, not given in evidence.

And, upon this error assigned, it was demurred in law. And, after argument at the bar, the court resolved, that it was not any error, nor could be alledged for error: for it doth not appear, that it was evidence given to the juror by any of the parties, or by any other in behalf of the plaintiff; but it shall be intended, that he shewed it of himself, and, that it was a piece of evidence, which he had about him before, and shewed it to inform himself and his fellows; and, as he might declare it as a witness, that he knew it to be true; so he might shew any thing which he knew: and therefore it is not like to 11 *H. IV*. 33. and 35 *H. VI*. Title *Examination*. They also held, that, if this were cause to avoid a verdict, if it had been so found by examination, as they conceived it was not, yet in regard it was not examined, nor made parcel of the record, it cannot be assigned for error. For *Popham*

 said,

ſaid, the trial hereof reſts only in the examination, and it ſhall not be *per pais*, as *non-age* ſhall be by *inſpection*, to avoid a fine; ſo this matter ſhould, to avoid the verdict; for, if ſo, then every verdict upon ſuch a ſurmiſe, might be drawn in queſtion, and peradventure, after the parties are dead, and all the jurors dead, ſo as they cannot be examined, which would be a great inconvenience. And therefore they held that ſuch a cauſe of ſtaying the judgment ought to be always, if it be upon verdict at *niſi prius*, upon the *poſtea* returned: and, if it be upon verdict in *banco*, it ought to be made parcel of the record; otherwiſe the party ſhall not take advantage of ſtaying the judgment or of aſſigning it for error.

Another error was aſſigned *ore tenus*, that the record is, *ad quem diem, ſcilicit Octob. Trinitatis* 39. *præceptum eſt, quod habeat corpora Juratorum coram Juſticiariis in Banco in Craſtino Animarum, niſi Juſticiarii in partes illas venerint Octavo Julii proxime præterito*, where it ought to have been *proxime ſequente. Sed non allocatur:* for it was ſaid, that all the precedents are ſo, in the common-bench, to make their entries as of the time paſt: but otherwiſe it is in this court. Wherefore the judgment was affirmed.

Afterwards, at another day, it was moved to have coſts allowed, and damages for the delay of execution, upon the ſtatute of 3 *H. VII. cap.* 10. whereupon it was doubted, becauſe it was in a *formedon*, in which (being the principal action) no coſts were allowable. But, notwithſtanding, upon conſideration of the ſtatute, for that the ſtatute is general, *that, if a writ of error be brought before execution, and*

in

in delay of the execution, and the judgment be afterwards affirmed, that the demandant, or plaintiff, ſhall have coſts, and damages; and it mentions not any action: they all reſolved, that coſts and damages ſhould be given for delay of execution, although in the firſt action no damages were recoverable: wherefore it was adjudged accordingly.

Watts v. Brains, M. 42 Eliz. Cro. Eliz. 778. Vide Co. Ent. 59. a. &c. Vide alſo Cro. Eliz, 695. Appeal of murder, malice prepenſe. The parties had quarrelled three days before.

Appeal of murder for the death of plaintiff's huſband. The defendant pleaded *not guilty*; and upon evidence at the bar it appeared, that two days before her huſband's death, he, and the defendant fighting upon a quarrel then between them, the defendant was hurt in that fray; and the third day after the plaintiff's huſband, paſſing by the defendant's ſhop, the defendant purſued him ſuddenly, and the huſband's back being towards him, ſo that he did not perceive him, the defendant ſtruck him upon the calf of his leg, whereof he inſtantly died. The defendant to excuſe himſelf, affirmed, that he who was ſlain, when he came by his ſhop, ſmiled upon him, and wryed his mouth at him; and therefore, for this mocking of him, he purſued him. And it was much inforced by the defendant's counſel, that it was a new cauſe of quarrel, and ſo the ſtroke is not upon any precedent malice, and therefore not murder. But all the court ſeverally delivered their opinions, that if one make a wry, or diſtorted mouth, or the like countenance upon another, and the other immediately purſues, and kills him, it is murder: for it ſhall be preſumed to be malice precedent; and that ſuch a ſlight provocation was not ſufficient ground, or pretence, for a quarrel; and ſo delivered the law

to the jury, that it was murder, although what the defendant pretended had been true. Whereupon the jury going from the bar, notwithſtanding the evidence was pregnant againſt the defendant, eight of them agreed to find him *not guilty:* but the other four withſtood them, and would find it murder: and on the next morning, two of the four agreed with the eight, to find him *not guilty:* and afterwards the other two conſented in this manner, that they ſhould bring in and offer their verdict *not guilty*; and if the court diſliked thereof, that then they all ſhould change the verdict and find him *guilty:* and upon this agreement they came to the bar, and the foreman pronounced the verdict, that the defendant was *not guilty:* and the court much miſliking thereof, being contrary to their direction, examined every one of them by the *poll*, whether that was his verdict: and ten of the firſt part of the pannel, ſeverally, affirmed their verdict, that the defendant was *not guilty:* but the two laſt affirmed, how they agreed, and diſcovered the whole manner of their agreement: whereupon, they were ſent back again, and returned, and found the defendant *guilty*. And for this practice *Harris*, the foreman, was afterwards fined 100 marks, and the other ſeven who agreed with him at the firſt, every of them was fined 40 l. and the other two, who agreed with the eight, although they affirmed, that it was, becauſe they could not endure, or hold out any longer; yet, for that they did not diſcover the practice, being examined by *poll*, but affirmed the verdict, were fined each of them at 20 l. and all of them impriſoned: but the other two were diſmiſſed, yet blamed for ſuch a manner of con-

ſenting

ſenting in abuſe of the court. And afterwards the defendant was adjudged to be hanged.

The court denied to grant a new trial, upon affidavit that the jury went by votes; tho' Serjeant *Stroud* ſaid it had been granted in the like caſe.

P. 2 Jac. II. B. R. Comb. 14.

A new trial was moved for upon affidavit, that the jury took an act of common-council out with them, and that printed libels were ſpread againſt the defendant, and it was denied: for as to the firſt it differs from the Lady *Ives*'s caſe, where they took a map of one ſide, which was evidence on neither ſide: but this was an act of neither ſide, and evidence on both; but admitted to be irregular. *Et per Holt*, C. J. So if a jury eat at their own charge, 'tis fineable, but that verdict ſhall ſtand; otherwiſe if at the charge of one of the parties, and the verdict is found for him. *Vide Mo.* 599.

King v. Burdett M. 8 W. III. B. R. Salk. 645. Jury after going from the bar ſent for an act of common council given in evidence, and new trial denied.

A new trial was granted upon affidavit, that the foreman declared the plaintiff ſhould never have a verdict, whatever witneſſes he produced.

Dent v. Hundred of Hertford, M. 8 W. III. B. R. Sal. 645. See Fareſl. 31, and 37.

In an action brought againſt an officer, for a ſeizure *abſque probabili cauſa*, a new trial was granted, becauſe the jury threw up croſs or pile, whether they ſhould give the plaintiff three hundred pounds or five hundred pounds damages, and the chance for five hundred pounds came up. And *note*, the court now made a rule, that *Middleſex* juries at *niſi prius* ſhall be paid in court.

Mellifh v. Arnold, M. 1719. Bunb. 51. New trial granted for miſbehaviour of the jury.

Note, The affidavits moved upon were made by perſons who heard the jurymen talk of the matter; and the jurymen did not think fit to make any affidavit to clear themſelves; ſo a new trial was granted.

A writ

The Queen v. the Bailiffs and Burgesses of Bewdley, in com. Worcester. M. 1712. B. R. 1 P. Wms. 207. Scire facias to repeal a charter.

A writ of *scire facias* issued out of the petty bag, in chancery, to repeal the charter granted to this borough *septimo Annæ Regin'*. Whereupon issue being joined, and the record transmitted into the crown-office of the queen's-bench, in *Trinity* term *undecimo Annæ*, the cause was tried at the bar of that court.

The points in issue were,

Vide the points opposite.

1st. Whether one *Thomas Smith* was duly elected bailiff on the 25th of *September*, 1707?

2dly. Whether there were a bailiff and burgesses (*i. e.* a corporation) in being at the time of granting this charter?

3dly. Whether that corporation refused this charter?

The case upon evidence, not being given by Mr. *Williams*, cannot be stated here, nor is it necessary: the two former were the principal questions; and the proof upon them was in short this:

As to the first point, it appeared, that by the charter of *Jac. I.* all the burgesses (as well common, as capital,) had a right of voting in the election of a bailiff, and that a bailiff might be chosen out of the burgesses.

That *Smith* was a common burgess under that charter, and that he was elected after the invalidity of king *James II.*'s charter was publicly known and acknowledged; and that the common burgesses qualified under the old charter were then admitted to vote, (which had not been done from the time of accepting king *James II.*'s charter, to that day,) and that *Smith* had the majority of those burgesses; but it appeared, that one *Coldwell*, the bailiff for the time being, who presided at this election, and took the poll, was in by virtue of the

void

void charter, and that he was never so much as a common burgess under the old charter.

That he acted with fourteen capital burgesses, which is the number appointed by the void charter, and that the burgesses qualified by that charter were called, and voted promiscuously with those qualified by the old.

2dly. As to the second point, it appeared, that by the charter of king *James I.* the bailiff and capital burgesses were to do all corporate acts, and were originally to chuse in the common burgesses.

That upon the death or vacancy of any of the capital burgesses, the charter appoints that *residuum capital' burgens' vel major pars eorund'*, shall chuse in others within fifteen days after such vacancy; that they had neglected to fill up vacancies for these twenty-two years last past, and that at the time of granting the charter of her present majesty, there was only one capital burgess in being (*viz.* one *Slade*,) qualified under the charter of king *James I.*

Upon this evidence several questions in law arose.

1st. As to *Smith*'s election, whether that must not be taken to be one intire act, done under the direction of the illegal bailiff, by virtue of the charter of king *James II.* and consequently void; the old burgesses having submitted to be called by that bailiff, and voted promiscuously with the others, without distinction?

2dly. Whether, according to the charter of king *James I.* the capital burgesses were not to be taken to be extinct, there being but one remaining?

3dly. The capital burgesses being an integral part of the body, by the old charter,

 whether

whether the corporation could ſubſiſt without them, or muſt, in defect of them, be diſſolved ?

After ſome debate at the bar; the counſel for the defendants prayed a ſpecial verdict, and the chief juſtice, in ſumming up the evidence, directed the jury to reſerve theſe points; for that they were of too great moment to be determined without conſideration; but ſome diſputes ariſing thereupon among the judges, *Parker*, chief juſtice, ſaid, that the election of *Smith* to be bailiff ſeemed to him to be made under the void charter, and that it could not be under any other; that *Coldwell* was bailiff under that charter, and all the voters ſubmitted to his authority, which the old burgeſſes ought not to have done, but to have inſiſted upon their ancient right, and oppoſed the others joining with them; that it was a particular power given by the charter, and, in ſome degree, like the caſe of *Wroth v. Wigs*, 4 Rep. 39 *b*, very different from the caſe of electing members of parliament, (which had been mentioned at the bar) for there they all come under pretence of the ſame right, and by a proper authority to chuſe.

But ſuppoſing *Smith* was duly elected, there was no proper officer to ſwear him in, neither bailiff nor recorder, by the charter of king *James I.* for *Coldwell* was not ſo much as bailiff *de facto*, but a bailiff of a different corporation, as effectually as if he had been bailiff of another town. To make him a bailiff *de facto*, he muſt have been in under a right conſtitution; whereas he was in by a void one, and had no pretence of right by the old charter.

As to the ſecond queſtion his lordſhip ſaid, he could not think it within the intention of the charter, which appoints the vacancies of the

the capital burgesses to be filled up within fifteen days, that twenty-two years should be permitted to elapse, till these were all extinct to one man, and that one to have the power of electing all the rest.

As to the third, he thought it a question of great moment, whether this corporation could subsist without capital burgesses, they being made necessary to all corporate acts?

Powell J. could not think the corporation was dissolved for want of capital burgesses, but doubted whether they could act; that it was not material whether *Coldwell* was a lawful bailiff or not; for that the corporation might, upon their charter-day, chuse a bailiff, tho' there were none then in being, nor had been for twenty years before; not like the case of *Wroth* and *Wigs*, for that was of a judicial authority.

(*a*) *Eyre* J. thought the third question very considerable, (*viz.*) Whether, if a corporation loses one of its integral parts, it be not dissolved? *vide* 1 *Rol. Abr. pag.* 514. tit. *Corporations*; the case of a corporation consisting of brothers and sisters.

As to the second question he said, that when a corporation lapses the day of chusing its head, the royal authority must interpose; and in the *interim*, the operation of it ceases. That in this case there had not been a regular election of a bailiff for several years.

That if *Smith* was chosen in execution of the charter of *Jac. II.* tho' at an assembly not under that charter, he was in by virtue thereof; that it was held in the case of the *Devizes*, that

(*a*) Note; Mr. Justice *Littleton Powis* was absent all this term, being indisposed with the gout.

a good mayor for the time being, is neceſſary to the election of another.

Notwithſtanding the *court* was ſo *doubtful* in theſe points, the *jury* were, however, *very clear* in them; and about three of the clock next morning gave a privy verdict, by which they found all the iſſues *generally*, for the *queen*, and affirmed it at the bar about ten; and tho' they were ſent out again by the court, perſiſted with great obſtinacy.

Hereupon the defendants came and moved that the verdict might be ſet aſide, upon theſe two points:

Where the jury bring in their verdict contrary to the direction of the court, a new trial may be granted, even after a trial at bar.

1ſt. For that the jury had found matter of law, and contrary to direction.

2dly, For that the *venire* was wrong awarded, being *de vicineto de Bewdley*, whereas by the 4th and 5th of queen *Anne*, *cap.* 16. for the amendment of the law, it ought to have been *de corpore comitatûs*.

The court, after advice with the juſtices of *C. B.* and barons of the *Exchequer*, gave their opinion upon the firſt point the ſame term; and the Lord Chief Juſtice delivered it as the opinion of all the judges of *England*, (except *Powell*) that when the defendant's counſel pray a ſpecial verdict, and the court direct the jury to find one, if the jury will take upon them to go contrary to that direction, and find matter of law; it is a ſufficient ground for a new trial, even after a trial at bar.

For that it would be very unreaſonable, that in caſes where the court and the jury are *both* of opinion againſt the party, there he ſhould have a remedy by a bill of exceptions; but that in caſes where the jury *only* are of opinion againſt him, and the court doubtful, he ſhould

be

be abſolutely concluded, and without remedy, as he muſt be in this caſe.

Powell J. contra: I do not very well know upon what foundation of law new trials have been granted; but I found the courts in poſſeſſion of ſuch a practice as to trials by *niſi prius*; but I do not know that this practice has been eſtabliſhed as to trials at bar.

Indeed I do remember two in the exchequer in my time, but I was always of opinion againſt them, and that for theſe reaſons, becauſe one is a trial at common-law, and the other by ſpecial commiſſion only; and becauſe trials at bar are much more ſolemn, and attended with much greater charge to the parties, than the other.

I do not think any thing ought to be a ground for a new trial, after a trial at bar, but what would make the jury liable to an attaint.

Chief Juſtice: The firſt caſe of a new trial, which we find in the books, is that of *Wood* and *Gunſton*, in *Styles*, 462. 466. and that was after a trial at bar.

Vide Poſt VI.

The practice of the courts is the law in theſe caſes; and ſo of ejectments and rules for paying money into court, which have no other foundation.

In the caſe of *Briſtol* v. *Cooper* *, a ſpecial verdict was prayed and directed, and the jury found generally; whereupon a new trial was granted for that reaſon.

* I can't find this caſe reported.

Dowman's caſe in the 9 *Rep.* is very obſervable, about the ſeveral duties of judges and jurors in this particular.

9 Co. the 1ſt. caſe.

In moſt caſes, even where new trials, after trials at bar, have been denied, the judges have aſſerted the general right, and one reaſon why we do not find this practice more ancient,

may

may be, that there are no old reports of motions.

Eyre J. I do not find the reaſons for new trials confined to miſdemeanors for which the jury may be fined; the caſe of *Wood* and *Gunſton* was not ſo.

But if a new trial ſhall be granted in a caſe where the jury have done wrong, in a matter which is properly under their cognizance, I cannot ſee any reaſon why it may not be done in caſes where they take upon them to determine matters not within their cognizance. *Vide* 1 *Sid.* 153 *.

* This is the caſe of Rex v. Fenwick and Holt. Vide poſt IX. (12.) (b.)

The counſel for the queen inſiſted, that this verdict being ſet aſide for a miſbehaviour of the jury, and not any fault in the proſecutor, coſts ought to be allowed.

But the court ſaid, there was no need of entering into that queſtion, 'till the matter of the *venire* was determined; and adjourned the conſideration of that 'till *Michaelmas* term following, for the advice of the other judges.

Accordingly in *Michaelmas* term (4 Nov.) this point was argued before all the judges of *England*, at *Serjeant's-inn*, in *Fleet-ſtreet*.

Serjeant *Prat pro def'*. By the ſtatute of the 4th and 5th of her preſent majeſty for the amendment of the law, this *venire* ought to have been awarded *de corpore comitatûs*.

This is a caſe within the expreſs words and intention of the act; the words are, "That "from and after the firſt day of *Trinity* term, "every *venire facias* in any action or ſuit in "any of the courts at *Weſtminſter*, ſhall be "awarded of the body of the proper county;" and this is a ſuit in the court of chancery, in order to repeal the letters patent of the 7th of the preſent queen.

Neither

Neither is it leſs within the intention and miſchief deſigned to be prevented, as appears moſt plainly from the preamble, which recites, That whereas great delays do frequently "happen, by reaſon of challenges to the "array of panels of jurors, and to the polls, "for default of hundredors, for prevention "thereof, *&c.*" Now this is a proceeding to which that miſchief extended; for at the trial there might have been a challenge to the array, for want of hundredors.

That there may be ſuch a challenge in the caſe of the crown, is what cannot, I think, be denied; for if the ſheriff be commanded to return a jury *de vicineto*, and there is not any hundredor upon the panel, he has not obeyed the command of the writ, and the challenge is for his default.

3 *Keb.* 740. In an information for perjury, a motion was made, that the defendant might not challenge for want of hundredors, and it was denied; becauſe the ſubject would thereby be ouſted of a privilege to which he is intitled by law.

The ſtatute of 23 *H. VIII. cap.* 13. enacts, that in trials for murder, in corporations, there ſhall be no challenge for want of freeholders; by which it appears, that there might be ſuch a challenge at common law, in the caſe of the crown; and certainly where freeholders are neceſſary, hundredors are equally ſo.

This act being made for the advancement of juſtice, it ought to have the moſt beneficial and extenſive conſtruction imaginable; but to ſay, that the crown ſhall not have a jury *de corpore comitatûs*, is to deprive it of the benefit and advantage of an act of parliament.

 It

It is true, that, generally, the crown ſhall not be ouſted of its prerogative by an act of parliament, unleſs it be expreſsly mentioned; but that rule cannot affect this caſe, for here the crown had no prerogative: it was liable to the inconveniences recited in the preamble, as well as the ſubject, and then ſurely it ought not to be debarred of a ſhare in the remedy.

The intention of this act may be further collected from the next clauſe, which plainly proves, that the law-makers took it to extend to caſes of the crown; for it expreſsly excepts all appeals, indictments and proſecutions on penal ſtatutes, and what occaſion could there have been for that exception, if the former clauſe had not taken in any crown caſes at all?

But, I think, it deſerves to be conſidered, whether this proſecution be properly a ſuit of the crown or not? It ſeems to be no more than a contention between two corporations, whether the letters patent granted to one ſide, or thoſe granted to the other, ſhall prevail? Both are contending for a royal charter, and the crown is perfectly indifferent who obtains it; the judgment in this caſe will be only for the benefit of the party, for here can be no judgment of puniſhment for the uſurpation, as in informations in the nature of *quo warranto's*.

Sir *Peter King*: The words of this act are as general and comprehenſive as poſſible, "Every *venire facias* for the trial of any iſſue, "in any action or ſuit."

That there might be challenges both to the array, and to the polls, in the caſe of the crown, appears from *Keilw.* 102. *a.* And this ſtatute is made for the remedy of that

miſchief

mischief in all cases where it might possibly happen before, some few only being excepted by name. But in the present case, Mr. *Attorney General* is contending for the crown, that it shall not have the benefit of a very useful and advantageous law; this is like a man's disabling himself. *Lit. sect.* 410.

I know no instance in the law, where the crown is excluded out of general statutes made for the benefit and advantage of prosecutors. The cases, wherein the crown is held not to be bound, are, where it would otherwise be debarred of a precedent right or prerogative; but in the case at bar, the crown was before this act in the same condition with the subject; and I hope it will appear, that this is not *placitum coronæ*, but at most a civil action brought in the name of the crown. See Sir *Oliver Butler*'s case, 2 *Vent.* 344. 3 *Lev.* 220. In Mr. *Brewster*'s (*a*) case, *Holt*, *C. J.* said, this was a writ of right.

(a) 6 Mod. 229.

Though taking it either way, *viz.* as a suit of the crown, or of the subject, this *venire* is wrong, and if so, we are in the only method to take advantage of it: the sheriff has done his duty, and obeyed the command of the writ, and therefore we could not challenge the array, but come to the court to quash it: challenge is for the default of the sheriff, where the writ is right; quashing is for error in the writ itself.

Mr. *Salkeld:* The great objection in this case is, that the act of the 4 and 5 *Annæ* is a statute of *jeofails*, and that therefore this case is not comprehended within it. This act of parliament consists of distinct branches, which are separate laws; some of them are statutes of *jeofails*, and others statutes alterative of the

 com-

common law; and the clauſe, upon which this queſtion ariſes, is of the latter ſort.

Statutes of *jeofails* concern ſuch faults as would vitiate the judgment, and make it erroneous, if given, and are to enable the courts to amend ſuch faults, or to overlook them, and to give judgment notwithſtanding.

The clauſe about *venire's* is not of this nature, but is an intire alteration of the law in this particular, making that to be right now, which was wrong before, *& ſic vice verſâ.*

Statutes of *jeofails* make no alteration in the law; for the errors they concern, continue ſo notwithſtanding, but only provide a remedy, that they may not prejudice the party.

The chief reaſon why the ſtatutes of *jeofails* have not been held to extend to the crown is, that ſuch words are uſed in them, as always exclude the crown, *viz.* plaintiff and defendant, demandant and tenant, *&c.* otherwiſe here.

So far as this is a ſtatute of *jeofails*, the crown is not comprehended within it; but ſo far as it is an act of alteration, the crown is included.

Thus in 36 *Ed. III. cap.* 15. the firſt clauſe changes the courſe of pleading, and by that the king has been always held to be bound; but the ſecond clauſe, which provides, "That "no man ſhall be prejudiced for want of form "in pleading," *&c.* being a law of *jeofails*, has for that reaſon been held not to extend to the crown; ſo of 16 and 17 *Car. II. cap.* 8.

Northey attorney general *pro Reginâ*: The practice of the Crown-office ever ſince the making of this act, in all caſes of informations, as well in thoſe not excepted, as in thoſe compriſed within the *exception*, has been to award the

the *venire de vicineto*, and it was never controverted till now.

And to this purpose I would apply what I have heard my lord *Hale* say on like occasions, "That judges ought to have a great regard "to practice, when the matter is not *res in-* "*tegra*; and when things have gone on in "that course a great while, without being "broken in upon."

As to what has been said, that the words of this act extend to cases of the crown, the 4 *Hen. VI. cap.* 3. has words as general, *viz.* any process or plea, and yet was never taken to extend to the crown. The clause in the statute of (*a*) frauds, whereby executions are made to bind from the delivery of the writ to the sheriff, has general words, *viz.* every writ of execution, and yet the crown is held not to be bound by them, notwithstanding it had no prerogative in the case before. I wonder to hear this denied to be a suit of the crown, since the same being brought in the name of the crown, (though for the benefit of the party,) makes it the suit of the crown; as in *quo warranto's*, *&c.*

(*a*) 29 Car. II. cap. 3. sect. 16.

In a late case of a *quo warranto* of a claim of fishery in several vills, the *venire* was awarded from one only, and held well enough, because tried by a jury of the proper county; so in the case at bar.

If the resolution in this case should be contrary to the received practice, it would shake all the judgments that have been given upon informations since the making of this act.

Raymond solicitor general: The words in several other clauses in this statute are as general as in this, and yet the crown has been held not to be comprehended within them;

 for

for inſtance, that about demurrers, and that about pleading double; *Regina* v. *Foley*, a motion was made for liberty to plead double, and denied, becauſe not within the clauſe.

The words in ſome of the former ſtatutes of *jeofails* are as large and comprehenſive as here; however they have not been held to extend to the crown: nay, it appears to have been the opinion of the makers of this act, that neither thoſe ſtatutes, nor this of the 4th and 5th of her preſent majeſty, could take in crown-caſes; for they have added a clauſe at the end, to extend this and all the ſtatutes of *jeofails* to ſuits for recovery of debts owing to the *revenue*, which had been ſuperfluous, if the former clauſes had been inſufficient.

But if this caſe be held to be within the 4 and 5 *Annæ*, I hope the ſame reaſon will bring it within other acts of *jeofails*, which contain words as general and comprehenſive, and then it will be helped by 16 and 17 *Car. II. cap.* 8. the cauſe being tried by a jury of the proper county.

Mr. *Lutwyche:* It is conſiderable, in this caſe, who is the perſon that takes the exception to this proceſs, and how he is prejudiced by it? Why truly the defendant comes and complains, that he has had a greater advantage put in his power than he ſhould have had; that he has had a liberty of challenging given him, which, by law, he ought not to have had.

The principal reaſon why the ſtatutes of *jeofails* have not been taken to extend to the crown, is, becauſe it is not expreſly named; and this reaſon holds in the act of the 4th and 5th of her preſent majeſty. See the 8th of

II.

H. VI. and alſo the late caſe of the *Queen* v. *Tutchin* (*a.*)

(*a*) Mich. 3 Annæ.

In *Cro. Car.* 311. the *venire facias* was awarded from the town, whereas it ought to have been from the manor; and held ill in a *quo warranto*; and that the ſtatute of 21 *Jac. I.* did not extend to it; notwithſtanding that had an exception of ſome other crown caſes, as in this act.

The clauſe about pleading double is general, and uſes the word [defendant] which is proper for all ſuits, and yet held not to extend to the crown.

It is no objection to ſay, that this is a ſuit for the benefit of the party; for ſo are informations in the nature of a *quo warranto*; but that this is properly a ſuit of the crown, appears, in that the attorney general replies, and the proceedings are in the crown-office; for, if it were not *placitum coronæ*, it ſhould have come on the *civil* ſide.

But if this act be taken to extend to the caſe at bar, there can be no reaſon why it ſhould not likewiſe be within the 16 and 17 *Car. II.* and it will be no objection to ſay, that this ariſes upon a ſubſequent act, for that ſtatute has always received a very large conſtruction, and been extended even to (*a*) local actions tried in wrong counties.

(*a*) Sed quære.

Serj. *Pratt* in his reply for the defendants: *Regina* v. *Foley*, was an information in the nature of a *quo warranto*, which is a criminal proceeding, and beſides, the reſolution was upon the clauſe about pleading double, which is not general; for though it uſes the word [defendant] which is a general term, yet it is reſtrained there by other words, *viz.* tenant and plaintiff in replevin.

The case of *Tutchin* was upon a meer statute of *jeofails*; this is an intire alteration of the law.

The clause, which extends this, and all the statutes of *jeofails*, to cases of the crown, mentions only suits for the recovery of any debt, and therefore cannot affect the present question; and certainly if there be no provision for that purpose, it is impossible that those other statutes should extend to this cause, because it arises upon a subsequent statute which has made a perfect alteration of the law in this point.

Sir *Peter King:* As to the pleading double, see *Poph.* 144. The words of the statute of frauds cannot possibly extend to the crown; for they are, "every writ of *fieri facias*, or "other writ of execution," and *fieri facias* being first named, the subsequent words can only mean *mesne* executions at the suit of the party.

Mr. *Salkeld:* The 8th *Hen. VI. cap.* 12. is grafted on the former statute of *Hen. V.* and expressly tied down to it, so that no general words can carry it any further. Nothing can be inferred from any resolution upon the preceding clauses of this statute; for the very words of them exclude the crown, *viz.* 1st, Party demurring. 2dly, Plaintiff or demandant appearing by warrant of attorney. 3dly, Defendant or plaintiff in replevin.

After consideration, all the justices and barons were unanimous, and the lord chief justice delivered their opinion in court the same term.

In prosecutions of the crown, though since the late statute of the 4th and 5th of queen Anne the venire facias, which was awarded de vicineto, and not de corpore com', held good.

Parker, C. J.—We are all of opinion, though this clause might have extended to causes of the crown, had the objection come earlier, yet the constant practice, ever since the making of the act, having been otherwise, and all the precedents both in the Crown-office,

fice, and in the Exchequer, (in cafes not expreſsly excepted,) being *de vicineto*; to make a contrary reſolution in this caſe, would be, in ſome meaſure, to overturn the juſtice of the nation for ſeveral years paſt; beſides, we conſidered that it is matter of no great conſequence; ſince it only gives the defendant a privilege of challenge, which otherwiſe he would not have.

It is a rule, indeed, that precedents *ſub ſilentio* are of little or no authority: but that is to be underſtood of caſes where there are judicial precedents to the contrary: but here there are none, either on one ſide, or the other. The chief baron mentioned a caſe in the Exchequer, which I remember: it was an information about the drawback upon ſalt, and there (as alſo in ſome others both here, and in that court) all the exceptions were taken that the wit of man could invent, but this was not ſo much as mentioned.

We did not think fit to break in upon an intire practice, and ſhake ſo many judgments upon a matter of ſo ſmall moment; and therefore are all of opinion, that the *venire* is well awarded.

The rule muſt be, that the laſt trial be ſet aſide upon the other point, on payment of coſts.

About three days after this rule for a new trial was pronounced; the defendant moved, that ſome perſons might be named to receive the coſts, it not appearing certainly, who was the proſecutor in this cauſe.

Whereupon, Mr. attorney general named *Borret*, the queen's ſolicitor, and acquainted the court, that the proſecution was carried on at the proper expence of the crown.

2 After-

Afterwards the solicitors on both sides went before the master, and the costs were taxed on *Saturday* the 22d of *November*.

And on the *Tuesday* following Mr. *Lechmere* made a motion, upon notice, against the taxation of costs in general, and against some *items* allowed by the master in particular.

The defendant shall pay costs for a new trial on a scire facias being brought by the crown to repeal a charter.

He insisted, that though they had submitted to a rule for the payment of costs, when the cause appeared, even upon the plaintiff's own shewing, to be merely a contention between the old and new corporations, upon the validity of their several charters; yet now it appeared in another light, and was owned by the attorney general as a government prosecution, carried on at the charge of the crown, they ought not to be stopped by that rule, from making it a question, whether in the case of the crown, costs are due by law, this being the first time they took advantage of that point. *Quod fuit concess' per cur'.*

To prove that in cases of the crown, or such as are properly government-prosecutions, costs are not due, he urged the course of the Exchequer, where costs are never paid, unless there be a relator, or some other security to answer costs to the party; which there was not in this case, nor could there be, because the prosecution was *in rem*, and not *in personam*; and for that he produced a manuscript of baron *Lechmere*.

That on the crown side in this court, costs had been so far from being allowed in any case, that it had been thought necessary to provide by (*a*) act of parliament, that there should be a recognizance given to answer costs in some particular cases; but this was none of those; that the law had provided no judgment,

(*a*) Vide 4th and 5th Gul' and Mar', cap. 18.

ment, nor process for costs, nor method to bring them into the Exchequer.

That if it were otherwise, it would be very unequal; for the queen paid no costs for not going on to trial; nay, Mr. attorney might enter a *noli prosequi*, or a *cesset processus* *, even when the jury were ready to give their verdict at the bar, without costs to the subject.

* Vide post Rex v. Benson, XI.

In the case of the *Queen* v. *Collins*, (*Michaelmas* 10 *Annæ*) in an information for a battery upon a custom-house officer, in the execution of his office, a motion was made for costs for not going on to trial; and upon Mr. *Harcourt*'s affirmation, that no costs were ever allowed in government prosecutions, the same was denied.

That in the case of the *Queen* v. *Clerk*, which was an information for a nuisance, *viz.* for erecting copper mills upon the river *Thames*, there was a verdict for the queen, which by *consent* was set aside upon payment of costs; the second verdict was for the defendant, who thereupon moved for costs, which were denied for this reason, (*scil.*) because the statute of the 24th of *Hen. VIII. cap.* 8. extends only to trials by *nisi prius*, and not at the bar, as it was in that case.

So in *Hill.* 3 *W. & M. in Scacc'* in my lord *Montgomery*'s case, which was an inquisition on his estate, and but in the nature of an ejectment, there was a verdict for the defendant, and a new trial granted without costs.

Vide post XI.

That here was no prerogative in the case, for the queen and subject were on an equal foot, and if the queen did not pay costs, she ought to receive none.

That this verdict was set aside as unjust, for a misbehaviour of the jury in the face of her

her majesty, who was suppofed to be always prefent in her court of Queen's-bench, which court faw plainly, no juft judgment could be entered up on that verdict, and yet the defendants were told, that this injuftice muft be faftened upon them, unlefs they paid two or three hundred pounds, to be delivered from it; furely this was to pay for juftice, contrary to *magna charta*, which fays, *nulli vendimus juftitiam.*'

'That in capital cafes, if a jury fhould obftinately find *generally*, where the court had directed them to find the matter *fpecially*, the court, no doubt, would fet afide fuch verdict, and that without cofts; they would not take away the life of a man, becaufe he had not money to pay cofts to the crown.

Now the confequence of this fuit was of equal concern to this corporation, as that of a capital profecution, to the life of a particular perfon; for the very life and being of this corporation were in queftion; and if cofts were once admitted in the cafe, thofe writs of *fcire facias*, though they had not yet fo harfh a found in the ears of *Englifhmen*, yet, he would undertake to prove, they would have ten times more pernicious effects than *quo warranto's* of old; for a judgment in a *quo warranto* did not deftroy the franchife, but a corporation might ftill, notwithftanding that, have another ftruggle for its liberty; but in the cafe of a *fcire-facias*, the judgment was a repeal of the charter; and if a jury could for once be fo managed, as to give a partial verdict, it was but getting fuch cofts taxed as a poor borough was not able to pay, and the bufinefs would be done; they could not pay the cofts, and without that, they fhould not have

have a new trial in order to come at right and justice.—This was *laying the ax to the root of the tree.*—The crown indeed was always an unequal match for the subjects: but if the weight of costs were thrown into the scale, this would become such an addition, as would make its prosecutions (*a*) heavier than they would be able to bear.

The jury having sat up all night, agreed in the morning to put two papers into a hat, marked *P.* and *D.* and so draw lots; *P.* came out, and they found for the plaintiff, which happened to be according to the evidence and the opinion of the judge.

Hale v. Cove, M. 12 G. Stra. 642. Where the jury drew lots, the court set aside the verdict though it was according to evidence.

Upon motion for a new trial, it was argued that the verdict must be set aside; but the question was, whether the defendant should pay costs; the court inclined to give the plaintiff costs, comparing it to the case of a verdict against evidence: but at last it was agreed that the costs should wait the event of the new trial.

Chapple moved to set aside defendant's verdict; the jurors upon differing in opinion, agreed to be determined by hustling half-pence in a hat; if the major part came up heads, the verdict was to be for defendants; but this matter not appearing upon the oath of any of the jurors, but by affidavit, that two of them had confessed the same, the court, upon the first motion, ordered the entry of final judgment to be stayed for a few days only, to give plaintiff an opportunity to procure affi-

Parr v. Seames and others, M. 8 G. II. Barnes 438. The jury differing in opinion, agree to be determined by hustling half-pence in an hat.

(*a*) By the records in the Crown-office it appears, that the defendants were, notwithstanding, ordered to pay costs, and that afterwards on a new trial, the jury found a special verdict, but this does not appear to have been ever argued.

davits

davits from ſome of the jurors; but it afterwards appearing that the jurors were fearful to make affidavits whereby to accuſe themſelves, and *Chapple* citing a caſe in *Salk*. 645. *Dent* againſt the hundred of *Hertford*, the court enlarged the rule upon hearing counſel on both ſides till next term. *Comyns* for plaintiff.

Vide ante.

Lord St. John v. Abbot, M. 9 G. II. Barnes 441. Several of the jurors leave their companions, and are abſent for ſome time.

This cauſe was tried at the laſt *Northampton* aſſizes before Mr. Juſtice *Reeve*; and after the evidence was ſummed up in the forenoon, the jury retired to conſider of their verdict: before the riſing of the court they came into court, attended by the bailiff, to aſk a queſtion, which was anſwered, and they were ſent back. At the ſitting of the court in the afternoon, the judge was informed that ſome of the jurymen (two or three) were in court; whereupon being aſked by him what they did there, anſwered they could not agree, and were thereupon ſent back to their fellows; and afterwards a verdict was brought in for plaintiff. The judge did not certify the verdict to be contrary to evidence; the court was of opinion that this was a miſbehaviour in the jury, for which they are finable; but not a ſufficient cauſe to ſet aſide the verdict; plaintiff was not in fault. If the jury eat and drink at their own expence, that is a miſbehaviour, for which they are finable, but their verdict muſt ſtand; though it is otherwiſe if they eat and drink at the expence of either party. Rule to ſhew cauſe why verdict ſhould not be ſet aſide, diſcharged. *Belfield* for plaintiff, *Birch* for defendant.

Phillips v. Fowler, E. 8 G. II Barnes 441.

After a motion in arreſt of judgment, and pending the conſideration of the court, it being diſcloſed to defendant by two of the jurors, that

that they and their fellows being divided in opinion had determined their verdict by *casting lots.* Defendant moved to set aside the verdict upon an affidavit of the fact made by the two jurors *; and upon hearing counsel on both sides, the question was, Whether after a motion in arrest of judgment, defendant in this case could move to set aside the verdict? And the lord chief justice, Mr. justice *Denton*, and Mr. justice *Comyns* were of opinion, that though this motion seems out of time by the general rule of practice, yet as it is founded upon a matter disclosed to the defendant after the motion in arrest of judgment, and is made before judgment pronounced, the court must receive it; and the fact, as to the jurors determining by *chance* being undisputed, the verdict was set aside. (Mr. justice *Fortescue, contra.*) *Vide* lord *Fitzwater*'s case *. *Salk.* 647. *Skinner* and others for defendant: *Chapple* and others for plaintiff.

Jury cast lots to determine their verdict.

* Vide infra this head, Vasie v. Delaval.

* Post IX. (12.)

Serjeant *Belfield* moves to set aside a verdict, because after the jurors were retired, one of them came out from the rest, and came to the attorney of the other side, and received a bundle of papers from him, which he carried in to the rest.

Jennings v. Warne, Eaft. 8 G. II. B. R. Annaly 116. After the jury had retired, one left the rest, and went to the attorney for one of the parties, received a bundle of papers, and carried them to the rest of the jury, and afterwards gave a verdict for that party.

Fortescue contra, alledges that this was nothing more than a map of the premises, which the judge had held in his hand all the trial.

Lord *Hardwicke:* It will depend only on this, whether it was delivered to the jury by consent of both parties, for if that appeared, it would prevent the parties alledging any thing against it; but as no such consent appears here, the verdict must be set aside.

Upon

Vasie v. Delaval, M. 26 G. III. B. R. Durnford and East, 1 V. 11. Affidavit of a juror that the jury having been divided, tossed up, and that the plaintiff had won, rejected.

* Vide ante.

(a) Vide Barnes 438, 441, 4to edition.

(b) Vide Cro. Eliz. 779.

Upon a motion by *Law* for a rule to set aside a verdict, upon an affidavit of two jurors, who swore that the jury, being divided in their opinion, tossed up, and the plaintiff's friends won, *Hale* v. *Cove*, 1 *Stra*. 642. * was cited.

Per Lord Mansfield, Ch. J.

The court cannot (*a*) receive such an affidavit from any of the jurymen themselves, in all of whom such conduct is a very high misdemeanor (*b*): but in every such case the court must derive their knowledge from some other source; such as from some person having seen the transaction through a window, or by some such other means.

Rule refused.

IV. Of

IV. Of Verdicts contrary to Evidence, of hard Actions, and where there is Evidence on both Sides.

Vide Post VI. *Farmer v.* Sir *Robert Darling*; VIII. *Patman v. Vaughan*; and IX. (6.) *Smith ex dm. Dormer, v. Parkhurst & al.*

The following cafes are, in general, arranged in chronological order, and not always claffed, according to the above fub-divifions.

In trefpafs for impounding the plaintiff's cattle, the defendant juftified for *common*, and upon that they were at iffue in *Derbyfhire*, and the jurors being fworn, the bailiff found *Bagfhaw*, one of the jurors, reading a letter concerning the caufe, and fhewed it to the judge, and a verdict given by the jury: and this matter was moved in the then king's-bench to quafh the verdict, but denied by the whole court, becaufe the letter and the caufe was not certified by the *poftea*, and made parcel of it; for, otherwife, the examination of that at the bar after the verdict, fhall never quafh it. And fo it was adjudged between *Vicary* and *Farthing*, 39 *Eliz.* where a church-book was given in evidence, of which you fhall never have remedy, except it be entered and made parcel of the record. *Sed Qu.*

Hall v. White, Paf. 5 Jac. 1 Brownl. 207. If a book which ought not, be given in evidence, the court above cannot remedy it, except it be returned with the poftea. Sed qu.

Vide Poft. IX. (4.)

Smith v. Bramston, M. 7. W. III. B. R. 1 Salk. 644. No new trial, the action being an hard one.

Case for negligently keeping his fire, verdict *pro def.* Tho' the verdict was against evidence, a new trial was denied, because it is an hard action; yet *note*, action against the hundred for a robbery, verdict *pro def.* and new trial granted. 1 *Sid.* 58.

In the same book and page is the following case:

Smith v. Frampton, M. 7. W. III. B. R. 1 Salk. 644. Hard action, 1 L. Ray 62, 3. S. C.

In case for negligently keeping his fire, *per quod*, the plaintiff's house was burnt, the verdict was for the defendant: and after great debate and consideration a new trial was denied; because it is an *hard* action and the jurors are judges of the fact: and yet Holt C. J. declared, he was not satisfied with that verdict. *Quære* whether the same case with the preceding?

Dunkly v Wade Pasch. 5 Ann. B. R. 1 Salk. 653.

In case for negligently keeping his fire, a verdict was found for the plaintiff, and a new trial granted. But *per cur*; had a verdict been for the defendant, we would hardly have granted a new trial, because 'tis an *hard* action.

Hard action.

N. B. By *Stat.* 6 *An. c.* 31. *f.* 6. it is enacted, that no action shall be prosecuted against any person, in whose house, *&c.* any fire accidentally begins, *&c.* This section is made perpetual by 10 *An. c.* 14. *f.* 1. *Sed qu.* if not repealed. *Vide* 12 *G. III. c.* 73. 14 *G. III. c.* 78. *f.* 101.

Anonymous P. 8 W. III. B. R. 1 Salk. 644.

The court never, or very rarely, grants new trials in actions for *words*, *per Holt*, C. J.

Starr. v. Wade. P. 10 W. III. B. R. 1 Salk. 647.

Lessor brought *trover* against the lessee, for trees cut down; yet because the lessee did it in trenching, and the plaintiff had thereby greater advantage, tho' the jury found for the defendant, yet the court would not grant a new trial.

Hard action.

Sparks v. Spicer, H. 10. W. III. B. R. 1 Salk. 648. Hard action. No intent to injure or offend.

One was ordered by the judge of assise to be hanged in chains; the officer hung him in *privato solo*; the owner brought trespass, and upon not guilty the jury found for the defendant,

fendant, and the court would not grant a new trial, it being done for convenience of place, and not to affront the owner.

An action brought for 50 l. penalty, for selling half a pint of cherry brandy. The fact was proved upon the trial to be done by defendant's wife; but several circumstances appeared to shew, that she was unwarily drawn in by false pretences. Lord Chief Justice *Eyre*, who tried the cause, directed the jury to find for plaintiff, but they found for defendant contrary to evidence. *Belfield* moved for a new trial, and a rule *nisi causa* was granted, but was afterwards discharged upon shewing cause; the action being hard, and the case having been represented to the commissioners of excise, who refused to direct a prosecution.

Philips, qui tam, v. Scullard. E. 6 Geo. II. Barnes 435. Hard action: and penal.

Two issues were joined between the parties; and upon trial both were found for plaintiff. Defendant moved for a new trial, and Mr. Baron *Comyns*, before whom the cause was tried, certified the verdict as to one of the issues to be contrary to evidence; but as to the other issue certified it to be right. The court, upon hearing council on both sides, were of opinion that the verdict could not be severed, and being right in part must stand. *Bayner* for defendant; *Darnal* for plaintiff.

Huddlestone, v. Brigstock and others. M. 7 Geo. II. Barnes 436. Both issues found for plaintiff; one right, the other against evidence.

Vide Post IX. (6.) *Brookes dim. Mence. v. Baldwyn.*

Vide Post V. Edie. & ano. v. East-Ind. Co. Cont.

In ejectment. This cause was tried before lord chief justice at the sittings, and a verdict obtained by lessor of plaintiff. Defendant moved to set aside the verdict, upon affidavits that some material witnesses for him, absented themselves, and did not appear upon the trial; and also prayed the chief justice's certificate, suggesting that the verdict was contrary to

Letgoe, upon the Demise of Wheeler, v. Pitt. Barnes 439. Verdict against Evidence. New trial.

evidence. The court rejected the affidavits relating to the witnesses absenting, as immaterial. The chief justice certified, that the premises in question were copyhold, and both parties claimed under one *George Cromwell*, who had made two several surrenders. The question upon the trial was, whether *Cromwell* was *compos mentis* at the time of the surrender under which the defendant claimed? That nothing was objected to *Cromwell*'s insanity 'till twelve years after such surrender; and that the chief justice was of opinion the strength of the evidence was with the defendant. The court ordered a new trial upon payment of costs. *Eyre* and *Glyde* for lessor of plaintiff; *Chapple* and *Wright* for defendant.

Howe and Granville M. 1 Ann. B.R. 7 Mod. 117. Evidence on both sides.

A new trial was denied after a view, there being evidence on both sides.

Ashley v. Ashley M. 14 Geo. II. in B. R. 2. Stra. 1142. No new trial where there is evidence on both sides.

The judge who tried this cause (which was upon a promissory note for 5000 l. and which the defendant insisted was forged) certified that the weight of the evidence was with the plaintiff, and he thought the jury would find for the plaintiff; but they found for the defendant.

Et per curiam, as there was evidence on the part of the defendant, the jury are the proper judges which scale preponderates. It cannot be said to be a verdict against evidence, and therefore we will grant no new trial. The next day

Smith v. Huggins & al. ibid. evidence on both sides.

The same rule was laid down, and a new trial denied: though there was but weak evidence for the plaintiff, and the chief justice summed up strongly for the defendant.

Anonymous T. 16. and 17. Geo. II. B. R. 1 Wils. 22.

On a motion for a new trial in an action by the owner of the inheritance for making a dam cross an ancient water-course, the judge who

tried

tried the cause, certified that six witnesses were examined at the trial on each side; that the jury found for the defendant, which was against his opinion, but that he could not take upon himself to say that this was a verdict against evidence, because there was evidence on both sides, so a new trial was refused.

No new trial shall be where there was evidence on both sides, though a verdict be against the judge's opinion who tried the cause.

Macrow v. Hull, M. 30. Geo II. B. R. 1. Burr. 11.

Against evidence, but action frivolous.

The defendant's council shewed cause against the court's granting a new trial upon payment of costs; which had been moved for, by the plaintiff's council, upon the foot of the verdict's being *against evidence*.

Mr. *Just. Foster* (who tried the cause) reported it to be an action of trespass, *extremely frivolous*; but sufficiently proved. He said that the defence was a very strong one indeed, in *mitigation of damages*; but yet was not a *sufficient denial of the trespass*: so that, in strictness, the verdict was undoubtedly against evidence; however, he thought the action *so trifling*, *frivolous*, and *vexatious*, that he should have thought six-pence damages to have been enough.

Whereupon the court held, that NOTWITHSTANDING *it's being a verdict* AGAINST *evidence*, (which in general is a good reason for setting aside a verdict and granting a new trial,) yet the action appearing, in *this* case, to be *frivolous*, *trifling*, and *vexatious*, and the REAL *damages* little or none, they ought to refuse, and accordingly did refuse to set aside the verdict: and

Lord *Mansfield* added that it would even be a cruelty to the plaintiff, to grant his motion; as he must pay the costs of the former trial, if he should prevail in it; and yet could hope for such very small damages upon a new one. Rule discharged. *Vide Post.* the next case, *S. P. accord.*

Farewell, Esq; v. Chaffey and others. M. 30. Geo. II. 1 Burr. 54.
Verdict against evidence, but the action frivolous.

This cause was tried upon the western circuit, the last Summer assises, before Mr. Serjeant *Willes*; who certified "that the *weight of the evidence* was *against* the verdict." But a *new trial* was denied, upon the *nature* of the action, the *value* of the matter in dispute, and *other circumstances* of the case. *

* Vide ante the preceding case, Macrow v. Hull. S. P. and Post. Dr. Burton v. Thompson. M. 1758. S. P.

Lord MANSFIELD said, A NEW TRIAL ought to be granted, to attain REAL *justice*; but *not* to gratify litigious passions, upon every point of *summum jus*; and cited *Smith* v. *Bramston*, and *Smith* v. *Frampton*, in 2 *Salk*. 644. and an anonymous case there also mentioned, of *P*. 8 *W*. *III*. *B*. *R*. and likewise *Smith* v. *Page*, *M*. 8. *W*. *III*. *B*. *R*. *ibidem*; also *Deerly* v. *The Dutchess of Mazarine*, *H*. 8. *W*. *III*. *B*. *R*. 2 *Salk*. 646. and *Sparks* v. *Spicer*, *H*. 10. *W*. *III*. *B*. *R*. in the same book, *pa*. 648. To which may be added, what is said by the court, in the case of *Dunkly* v. *Wade*. P. 5. *Ann*. 2 *Salk*. 653.

Vide ante.

Vide Tab. Cas.

Vide ante.

In these cases, the verdicts were against evidence, and the strict rule of law, or obtained through surprize: but the court would not give a second chance of success to a *hard action*, or an *unconscionable defence*.

Therefore the court, upon the *same principles*, refused to grant a new trial in the present case, and discharged the rule to shew cause why there should not be one.

Rex v. White and Ward, E.T. 30 Geo. II. B. R. 1 Burr. 333.
Motion for a new trial, where defendants convicted of a nuisance, on the ground of the verdict being against evidence

The defendants had been convicted of a NUISANCE, in erecting and continuing their works at *Twickenham*, for making acid spirit of sulphur, oil of vitriol, and oil of *aqua fortis*. The indictment ran thus, *viz*. That "at the "PARISH of *Twickenham*, &c. near the king's "common highway there, and *near* the dwel-"ling houses of several of the inhabitants, "the

"the defendants erected twenty buildings for "making noisome, stinking and offensive liquors; and then and there made fires of "sea-coal and other things, which sent forth "abundance of *noisome*, *offensive* and *stinking* "smoke; and made, *&c.* great quantities of "*noisome*, *offensive*, *stinking* liquors; called, *&c.* "whereby and by reason of which noisome, "offensive, and stinking, *&c.* the *air was* "*impregnated with noisome and offensive stinks* "*and smells*; to the common nusance of all "the king's liege subjects, *inhabiting*, *&c.* and "travelling and passing *the said* king's com- "mon highway, and against the peace, *&c.*"

Sir *Richard Lloyd*—for the defendants—(on *Monday*, 15th *November*, 1756,) would have moved a *mixed* motion; *viz.* both for a *new trial*, and *also* in *arrest of judgment*; or, at least, in arrest of judgment *first*, and for a new trial *afterwards*. But

The court held that neither of these methods could consist with the GENERAL RULE *of the court*, or with a *particular rule* made in this case, to give them leave to move *either* of these motions on this day, though the four days given upon the *postea* were expired. Whereupon Sir *Richard* was obliged to begin with the motion for a *new trial*. And he said that this indictment was laid for making a liquor from whence the air was impregnated with *noxious*, *hurtful*, *unwholsome*, and stinking qualities: and the *English* word, "*noxious*" answers to the Latin "*nocivus*." But it appeared he said, *upon the evidence*, that the fumes, however offensive and disagreeable to many persons, were by no means in reality *noxious*, *hurtful*, or *unwholsome*; but the *contrary*.

Rule to shew cause: With this addition,— "That the defendants should have three days "time to move in arrest of judgment; *after* "the court shall have given their opinion "upon the *present* motion, for a new trial, as "upon a verdict AGAINST *evidence*."

On *Tuesday* the 23d. of the same month, Mr. Just. DENISON reported the evidence; which was of great length, he said, there being about 75 witnesses on each side: however, he collected the *substance* of it together in his report.

It appeared to be very strong on the part of the prosecution: and he declared himself *satisfied* with the verdict. And it appeared upon his report, that the smell was not only *intolerably* offensive, but also *noxious* and *hurtful*, and made many persons sick, and gave them head-achs.

Mr. Just. FOSTER said that "*noisome*" and "*noxious*" were synonimous terms; and that there was no other *Latin* word for "*noxious*," but "*nocivus*."

The *rule* was therefore DISCHARGED, as to *setting aside* the *verdict*.

Bright, Extor. of Hannah Crisp, widow, v. Eynon. T. 30 and 31. Geo. II. B. R. 1 Burr. 390. Evidence on both sides.

The plaintiff's counsel moved for a NEW TRIAL, upon payment of costs; and obtained a rule "to shew cause why this *verdict* should not be SET ASIDE upon payment of costs."

Lord *Mansfield* said that he did not choose, in any cause, tried before him, to conclude the matter by a short report, "that he was "satisfied, or dissatisfied, with the verdict." He would state the case particularly to the court; and reserve declaring his opinion of the verdict, (which he had not yet intimated, either at the trial or since,) 'till he had heard the counsel on both sides.

This

This was an action upon the case, brought by the plaintiff, as executor of *Hannah Crisp*, widow, deceased, against the defendant, upon a promissory note, in the following words, (all of the defendant's own writing,) which was proved and read: "I acknowledge to have "borrowed of Mrs. *Hannah Crisp*, this 29th. "day of *September*, 1753, the sum of 60 l. "for which I promise to pay 5 l. *per cent. per* "*annum*, and to be accountable for the whole, "six months after notice given for that pur-"pose. *John Eynon*. *September* 29th, 1753."

The defendant set up a *discharge*, by a writing in the following words: "I promise unto *John* "*Eynon*, that, *in consideration* of his paying "unto ME, interest for 60 l. *he* has of mine, "during my life, after the rate of 5 l. *per* "*cent. per annum*, that then the said 60 l. at "my decease, shall be *his*, and his note for "the same shall be *void*, and of *none effect*. "Witness my hand, this 10th day of *October*, "1753. *Hannah Crisp*." The *body* was all *his* own hand; but he called *two* witnesses who said they believed the *name* subscribed to be the hand of the testatrix: but their knowledge of her hand was very slight, one of them having only seen her sign a receipt.

He alledged that she gave this discharge, in consideration of a marriage between him and *Rebecca Bright* his now wife, (sister to the plaintiff.)

He produced a will, in his own custody, bearing date the 11th of *August*, 1753, by which the testatrix had made the said *Rebecca Bright* her executrix and residuary legatee.

This marriage was not till *May*, 1754: the testatrix died in *April*, 1756.

It

It came out, upon his own evidence, that the teſtatrix was not worth 200 l. and that ſhe paid five ſhillings a week, or at the rate of 13 l. a year, for her board. He could make no proof of the conſideration alledged: the fartheſt that any of his witneſſes went was to ſay, "that the teſtatrix ſeemed to approve the "match."

The plaintiff in reply, inſiſted "that the "ſignature was *forged.*" *Joſiah Bright* ſwore, that the defendant's wife did not know the defendant had borrowed any money from the teſtatrix, 'till after ſhe was married. After ſhe was acquainted with it, ſhe preſſed him to pay the money, out of a legacy of 150 l. from one *Sarah Hart*, which he received: for the teſtatrix might call it in. The defendant bid her not be uneaſy: "for I muſt have ſix "months notice."

Several witneſſes proved, that *Hannah Criſp*, about *Michaelmas*, 1754, talked of calling in the money upon this note, and lending it to other perſons.

That in 1755 and 1756, ſhe ordered letters to be wrote to the defendant for the money; when ſhe gave theſe orders, ſhe produced the defendant's note, and ſaid "the intereſt was "not enough to maintain her."

It was proved that the defendant entered a *caveat* at *Doctors-commons*, in *April*, 1756: and when he found ſhe had made a will in favour of the plaintiff, and conſequently revoked that which was in favour of his wife; he was very warm, and mentioned a note from him to her; and declared he would not withdraw his *caveat*, unleſs it was given up.

The plaintiff examined no witneſs, to ſay the ſignature was not her hand; by way of

rejoinder,

rejoinder, they called witnesses to the defendant's character: who gave him a good one.

The defendant instructed his counsel to say, that he always understood the gift to be revocable by *Hannah Crisp* during her life; but if she did not revoke or call in the money during her life, then the debt was to be discharged.

The principal question made at the trial was, "whether this latter note was forged, or "not." And as to that, the two witnesses who believed it to be her hand, were not opposed by any witnesses to the contrary: the reason given, was, that they had no opportunity of getting it inspected.

His lordship said, he left two questions to the jury: (1st.) "Whether the name of the "testatrix was *forged*; (2nd.) If they took it upon the evidence laid before them to be her hand, then "Whether it was not obtained by "*fraud*, and without her *knowing* the contents "and effects of the writing *she* signed."

The jury found for the defendant.

Lord *Mansfield* intimated nothing, then, as to *his own* opinion of the case; and professedly avoided doing it now, 'till he should have heard the counsel.

They were accordingly heard. And they who shewed cause against the rule, went very much at large into the *propriety* and *rise* of granting *new trials*. They urged that a verdict ought to be *conclusive*, where evidence of any sort was given on *both* sides. That the *forgery* here was the *only* question: and if the plaintiff objected *fraud* and *imposition*, he must go to a court of *equity* for relief.

Lord Mansfield.—Trials by jury, in civil causes, could not subsist now, without a power, *somewhere*, to grant new trials.

It

If an erroneous judgment be given in point of *law*, there are *many* ways to review and ſet it right.

Where a court judges of fact upon *depoſitions in writing*, their ſentence or decree may, *many* ways, be reviewed and ſet right.

But a general verdict can *only* be ſet right by a *new trial:* which is no more than having the cauſe more deliberately conſidered by *another jury*; when there is a reaſonable doubt, or perhaps a certainty, that *juſtice has not been done.*

The writ of *attaint* is now a mere ſound, in *every* caſe: in *many* it does not pretend to be a remedy.

There are numberleſs *cauſes* of falſe verdicts, *without* corruption or bad intention of the jurors. They may have heard too much of the matter, before the trial; and imbibed prejudices, without knowing it. The cauſe may be intricate: the examination may be ſo long as to diſtract and confound their attention.

Moſt general verdicts include *legal conſequences*, as well as propoſitions of fact: in drawing theſe conſequences, the jury may miſtake, and infer directly contrary to law.

The parties may be *ſurprized*, by a caſe falſely made at the trial, which they had no reaſon to expect, and therefore could not come prepared to anſwer.

If *unjuſt* verdicts, obtained under theſe and a thouſand like circumſtances, were to be concluſive for ever, the determination of civil property in this method of trial, would be very precarious and unſatisfactory. It is abſolutely *neceſſary to juſtice*, that there ſhould, upon many occaſions, be opportunities of *reconſidering* the cauſe by a new trial. And it is done in a way

very

very favourable to the parties for whom the wrong verdict is given: it is, *upon* payment of *costs*. Whereas in *other* cases where a wrong judgment is reversed, costs are paid as if the right judgment had been given in the first instance.

It is NOT *true* "that no new trials were "granted *before* 1655:" as has been said from *Style* 466.

In *Slade*'s case, *M.* 24. *C.* 1. (which was in 1648,) in *B. R.* reported in *Style* 138. The court was moved for judgment formerly stayed upon a certificate, made by Baron *Atkins*, "That the verdict passed against his opinion." *Bacon* justice said, "judgments HAVE BEEN arrested in the *common-pleas*, *upon such certificates*." *Hales*, of counsel with the defendant, prayed that the judgment in that case of *Slade* might be arrested, and that there might be a *new trial*; for that it HAD BEEN DONE THERETOFORE, in like cases. Indeed that case, as there reported, represents *Roll* justice to hold "that it ought not to be stayed, *though it* "*have been done* in the *common-pleas*: for that "it was too arbitrary for them to do it." And he adds, "You may have your attaint against "the jury; and there is no other remedy in "law for you; but it were good to advise the "party to suffer a new trial, for better satis- "faction."

In the case of *Wood* v. *Gunston*, *Michaelmas*, 1665, *Banc. Sup. Style* 466. (which was an action upon the case, for speaking scandalous words of the plaintiff, and a verdict for the plaintiff, with 1500 l. damages,) the defendant moved for a new trial. And *Glyn* chief justice said, "It was in the *discretion of the court*, in "*some* cases, to grant a new trial; but this

Vide Post VI.

"must

"must be a *judicial* and *not an arbitrary* dif-
"cretion. And it is FREQUENT IN OUR
"BOOKS, for the court to take notice of the
"mifcarriages of juries, and *to grant new*
"*trials* upon them. And it is for the *people's*
"*benefit* that it fhould be fo: for a *jury* may
"fometimes, by indirect dealings, be moved
"to fide with one party, and not to be in-
"different betwixt them; but it cannot be fo
"intended of the court." And in that cafe *a new trial was ordered*, upon the defendant's paying full cofts; the judgment ftanding as a fecurity to pay what might be recovered upon the next verdict.

The reafon why this matter cannot be traced *farther back*, is that the old report-books do not give any account of determinations made by the court upon *motions*."

Indeed, for a good while after this time, the granting of new trials was holden to a degree of *ftrictnefs* fo intolerable, that it drove the parties into a *court of equity*, to have, in effect, a new trial at law, of a *mere legal* queftion, becaufe the verdict in juftice, under all the circumftances, *ought not to conclude:* and many bills have been retained upon this ground; and the queftion tried over again at law, under the direction of a court of equity; and therefore of *late* years, the courts of law have gone more *liberally* into the granting of new trials, according to the circumftances of the refpective cafes. And the rule laid down by lord *Parker*, in the cafe of the *queen* againft *the corporation of Helfton*, *H.* 12 *Ann. B. R.* (*Lucas* 202.) feems to be the *beft general rule* that can be laid down upon this fubject, *viz.* "doing *juftice* to the party," or in other words, attaining the *juftice* of the cafe."

Vide poft IX. (12.)

The

The REASONS for granting a new trial muſt be collected from the *whole* evidence, and from the *nature* of the caſe, conſidered under *all its circumſtances.*

The power may be exerciſed at much leſs expence of time and money, therefore *more beneficially for the ſubject*, by the court of *common law* where the cauſe has been tried.

Of late years, new trials have been granted not only after trials at *niſi prius*, but alſo after trials *at bar*. And it is at leaſt *equally reaſonable* to do it after trials at bar, as after trials at *niſi prius*, (if the juſtice of the caſe demands it;) or indeed, rather *more* ſo, as the latter muſt be done upon what could have actually and perſonally appeared to a *ſingle* judge only, whereas the former is grounded upon what muſt have manifeſtly and fully appeared to the *whole* court.

I come now to the preſent verdict; and ſhould be ſorry that the queſtion depended upon *my* being ſatisfied, or diſſatisfied: and therefore I have ſtated the whole.

If the matter in diſpute was of *great value*, I will not ſay that all the ſuſpicious circumſtances *might not* be a ground for a new trial; to give the plaintiff an opportunity of getting the inſtrument *inſpected* by perſons acquainted with her *hand:* though I think upon the evidence *laid before the jury*, the verdict, in *that* reſpect, was *right.*

What I go upon is the apparent manifeſt FRAUD and IMPOSITION in *obtaining* the diſcharge from the teſtatrix, if SHE *really* ſigned it.

FRAUD or COVIN may, in judgment of the law, *avoid* every kind of act: many inſtances are put in *Fermor*'s caſe, 3 *Co.* 77.

" *What* circumstances and facts *amount* to " such fraud or covin," is always a question of *law*. Courts of equity, and courts of law, have a *concurrent* jurisdiction, to suppress and relieve against FRAUD. But the interposition of the former is often necessary for the *better investigating* truth, and to give *more complete* redress.

The writing, upon the *face* of it, speaks IMPOSITION. It purports being for *consideration*. She releases the principal, *in consideration of 5 l. per cent.* during her life: which is only legal interest, and the precise rate he was obliged to pay by his note. The defendant has set up *another* consideration, *not* expressed; which is not only *not proved* by him, but *disproved* by the evidence on both sides.

He now contends, and his counsel have argued, " that it was intended to be revocable " by her during her life; and therefore was " only in the nature of a legacy." That power " to revoke," *is omitted*. The writing, all of his *own hand*, and kept in his *own custody*: and if it was in the nature of a legacy, it is *revoked* by the subsequent will.

The testatrix *never imagined* she had stripped herself of this money: in her *circumstances*, it would have been madness. The defendant, *during her life*, did not dare to say, even to his own wife, " that the testatrix *had given* " him this money."

He did not dare to claim it, *immediately*, after her death: but would have *compounded*, by withdrawing his caveat, to have got his note delivered up. *No answer* was attempted, by proof, to the *apparent imposition*. Upon his own case stated by himself, and the evidence on both sides, the transaction to get her

her hand to this writing muſt have been *fraudulent*: and if it be ſo, the law ſays " he " ſhall *not avail* himſelf of it."

The *attention* of the jury was artfully drawn to the heinous charge of forgery *only*. And I left the queſtion of FRAUD to them, without any *expreſs* direction, " that the circum-" ſtances ſpoke fraud apparent." The *ſame* jury might, upon reconſideration, find a *different* verdict. I dare ſay they *meant* to do right.

But the merits of the caſe appearing to ME in this light, I am clearly of opinion that there *ought* to be a NEW TRIAL.

Theſe are my ſentiments: my brothers will judge whether I am right, or not.

Mr. Juſtice DENISON concurred in them.

He added, that it would be difficult perhaps to fix an *abſolute general rule* about granting new trials, without making ſo many exceptions to it, as might rather tend to darken the matter, than to explain it: but the granting a new trial, or refuſing it, muſt depend upon the LEGAL DISCRETION of the court, guided by the *nature and circumſtances* of the particular caſe, and directed with a view to the *attainment of juſtice*.

In the preſent caſe, he ſaid, it appeared to him, " that the teſtatrix, Mrs. *Criſp*, had been " *impoſed upon*:" and he held that FRAUD " was ſufficient to *invalidate* this her de-" feazance (the ſubſequent note of diſcharge " ſigned by her,) even in *a court of* COMMON " LAW." For proof of which, he cited *Throughgood*'s caſe, 2 *Co.* 9. where it was holden, " that the deed of an unlettered layman, into " the execution whereof he is *deceived*, by its " being wrong read to him, or falſely ex-

" plained to him, (though by a ſtranger to " the party to whom the deed was made,) " ſhall *not bind* the unlettered perſon who " made it."

Mr. Juſtice FOSTER agreed to the propriety of what had been ſaid, as to ſuch caſes in which the juries give verdicts *againſt* evidence, and even as to caſes where there may be a contrariety of evidence, but where the evidence upon the whole, in point of probability, greatly *preponderates againſt* the verdict; (which depending on a variety of circumſtances, is matter of legal diſcretion, and cannot be brought under any general rule:) but in all caſes where the evidence is *nearly in equilibrio*, he declared that he ſhould always think himſelf bound to have regard to the *finding of the jury*; for, " ad quæſtionem " * *facti* reſpondent *juratores*." In *ſuch* a caſe, it is *not* the province of the *judge* to determine: it ought to be left to the *jury*.

* See Trials per Pais, p. 447. extremely ſtrong on this ſubject, in favour of juries.

FRAUD will *invalidate* in a court of *law*, as well as in a court of *equity*. We all remember the caſe of *Wyndham* v. *Chetwynd*, *P.* 1755, 28 *G. II.* in this court, where the court directed the jury to find "*non deviſavit*," though there was a *deviſe in fact*, but it was *obtained by fraud*, and therefore conſidered as no *deviſe* at all.

And he agreed with Lord *Mansfield* and Mr. Juſtice *Deniſon*, that in the preſent caſe, the defeazance or diſcharge (the ſubſequent note) was obtained from Mrs. *Criſp by fraud*: and that it *appeared*, upon the whole of the evidence, " that it was *ſo obtained*:" and that the jury have drawn a WRONG CONCLUSION from facts *admitted on both ſides*. Therefore he thought the verdict ought to be ſet *aſide*.

Per

Per Cur. * unanimously,

The RULE for *setting aside* the verdict was made *absolute.*

Dr. Burton vs Thompson, Ms 32 Geo. II. 2 Burr. 664. Against evidence, but damages inconsiderable.

On shewing cause against a rule for a NEW TRIAL, which had been moved for by the plaintiff, upon an allegation "that the verdict (which was found for the defendant) was given *contrary to evidence*;"

Mr. Justice FOSTER, (who tried the cause) now reported, that it was an action for a libel; that the charge *was proved* by the plaintiff; but that the *injury* done to him thereby, appeared upon the evidence to be *so* VERY INCONSIDERABLE, that if the jury had found for the plaintiff, he should have thought *a half-crown*, or even a *much smaller sum*, to have been *sufficient* damages: but that the jury had gone too far; and instead of giving the plaintiff very small damages, had found a verdict *against* him; which was certainly a verdict AGAINST EVIDENCE.

Lord MANSFIELD.—It does not follow by necessary consequence, that there must ALWAYS be a new trial granted, in *all* cases whatsoever, where the verdict is *contrary to evidence:* for it is possible that the verdict *may still* be on the side of the *real* justice and equity of the case. And of this there are several in-

* Mr. Justice *Wilmot* was absent, in Chancery. Mr. *Gould*, of counsel for the plaintiff, moved that it might be *without costs:* but was answered by Mr. Justice *Denison* and Mr. Justice *Foster*, (Lord *Mansfield* being now gone,) that this was directly contrary to the terms upon which he himself had moved it. And accordingly they only ordered the verdict to be set aside, upon payment of costs by the plaintiff.

Memorandum.—The cause never came on to be tried again. Probably the defendant acquiesced in the opinion of the court, and paid the money.

 stances

ſtances in the * printed books, particularly the dutcheſs of *Mazarine*'s caſe in 2 *Salk.* 646. [*Dearly* v. the dutcheſs of *Mazarine*, † which is directly in point.]

* See title Trial in 2 Salk. pl. 2, 3, 4, 5, 11, 18, 34. See before, Farewell, Eſq; v. Chaffey et al'. † Vide poſt V.

Here the jury have found for the defendant, whereas my brother FOSTER, who tried the cauſe (which the plaintiff has brought hither out of *Yorkſhire*) ſays that "he thinks "*half a crown, or leſs*, would have been da- "mages ſufficient, IF *they had given their ver- "dict for the plaintiff*." He muſt pay the *coſts*, before he *can* have a new trial. Therefore I do not think that we ought to interfere, merely to give the plaintiff an opportunity of haraſſing the defendant at a great expence to himſelf; where there has been *no real* damage, and where the injury is ſo *trivial* as not to deſerve above an half-crown compenſation. Beſides the plaintiff has brought the action to be tried at a great diſtance from the proper county. The cauſe of action is in the nature of a *crime:* the implied damages are, in ſome meaſure, by way of *puniſhment*. An indictment or information would lie. And in *criminal* caſes, where the defendant is acquitted, a new trial cannot be granted.

Mr. Juſtice *Deniſon*, Mr. Juſtice *Foſter*, and Mr. Juſtice *Wilmot*, all ſpoke in very explicit terms to the ſame effect.

Per Cur. unanimouſly,

The rule to ſhew cauſe why there ſhould not be a new trial, was DISCHARGED.

Pillans and Roſe v. Van Mierop and Hopkins, E. 5 Geo. III. B. R. Tueſday, 30 April, 1765. 3 Burr. 1663. Againſt eviden. Of a nudum pactum.

On *Friday* the 25th of *January* laſt, Mr. Attorney General *Norton*, on behalf of the plaintiffs, moved for a new trial. He moved it as upon a verdict *againſt evidence:* the ſubſtance of which evidence was as follows.

One

One *White*, a merchant in *Ireland*, desired to draw upon the plaintiffs, who were merchants at *Rotterdam* in *Holland*, for 800l. payable to one *Clifford*, and proposed to give them credit upon a good house in *London*, for their reimbursement, or any other method of reimbursement.

The plaintiffs, in answer, desired a confirmed credit upon a house of rank in *London*, as the condition of their accepting the bill. *White* names the house of the defendants, *as* this house of rank, and offers credit upon *them*. Whereupon the *plaintiffs* honoured the draft, and *paid* the money; and *then* wrote to the defendants *Van Mierop* and *Hopkins*, merchants in *London*, (to whom *White* also wrote about the same time,) desiring to know, "whether "they would accept such bills as they, the "plaintiffs, should, in about a month's time, "draw upon the said *Van Mierop*'s and *Hop-*"*kins*'s house here in *London*, for 800 l. *upon* "*the credit of* WHITE:" and they, HAVING RECEIVED THEIR ASSENT, accordingly drew upon the defendants. In the interim, *White* failed, *before* their draft came to hand, or was even drawn: and the defendants gave notice of it to the plaintiffs, and forbid their drawing upon them; which they, nevertheless, did: and therefore the defendants *refused* to pay their bills.

See post, Mr. J. Wilmot's 2d argument in this case.

On the trial, a verdict was found for the defendants.

Upon shewing cause, on *Monday* the 11th of *February* last, it turned upon the several *letters* that had respectively passed between the plaintiffs and defendants, and *White*. The letters were read: 1st. Those * from *White* and Co. in *Ireland*, to the *plaintiffs* in *Holland*; (by which

* Dated 16th February, 1762.

which it appeared that *Pillans* and *Rose* had then accepted the bills drawn upon them by *White*, payable to *Clifford*;) then those of the plaintiffs to the *defendants*; and also *White*'s to the *defendants*; then those of the defendants to the plaintiffs, * *agreeing to honour their bill* drawn on account of *White*; the letter from the defendants to the plaintiffs, informing them "that *White* had stopt payment," and desiring them *not* to draw, as they *could not accept* their draft; and lastly, that which the plaintiffs wrote to the defendants, "that they "*should draw on* them, holding them *not to* "*be at liberty* to withdraw from their engage-"ment."

* Dated 19 Mar. 1762.

The COUNSEL for the defendants were Mr. Serjeant *Davy* and Mr. *Wallace*. They observed that the plaintiffs had *given credit to White*, above a month *before* the defendants had agreed to accept their draft: for it appears by *White*'s letter of 16th *February*, 1762, that *Pillans* and *Rose had then actually accepted Clifford's bills:* but *Van Mierop* and *Hopkins* did not agree to honour *their* drafts *till* the 19th of *March*, 1762: therefore the *consideration* was *past* and done, *before* their promise was made. And they argued, and principally insisted, "that for one man to *under-*"*take to pay another man's debt*," was a VOID *undertaking*, unless there was *some consideration* for such undertaking; and that a mere general promise, *without benefit* to the promiser, or loss to the promisee, was a *nudum pactum*. And they cited 1 *Bulst*. 120. *Thorner v. Field*. *Dyer* 272. *pl*. 31. *Hunt v. Bate*, 2 *Vern*. 224, 225. *Cecil et al. v. Earl of Salisbury*, 1 *Ro. Abr*. 11. *pl*. 1. *letter Q*. "Consideration exe-"cuted." *Yelv*. 40, 41. and 2 *Strange* 933.

Hayes

Hayes v. *Warren*; where a paſt conſideration was holden inſufficient to raiſe an aſſumpſit *.

The COUNSEL for the plaintiffs were Mr. Attorney General, Mr. *Walker*, and Mr. *Dunning*. They denied this to be a *paſt* conſideration; and inſiſted, that the liberty given to the plaintiffs, "*to draw upon a confirmed houſe* "*in London*," (which was prior to the undertaking by the defendants,) was the *conſideration of the credit given by the plaintiffs to White*'s drafts; and that this was a *good and ſufficient conſideration* for the *undertaking* made by the defendants. It *relates back* to the original tranſaction.

If any one promiſes to pay for goods delivered to a third perſon, ſuch promiſe, being in writing, is a *good* one.

And here *White* had had 800 l. from the plaintiffs, upon this aſſurance: and the defendants undertake in *writing*, in purſuance and completion of this original aſſurance, to be anſwerable for *White*'s reimburſing the plaintiffs; and a promiſe *in writing* is out of the ſtatute.

This caſe does not fall within thoſe that have been cited: for *Van Mierop* and *Hopkins* have made themſelves *originally liable*. An *ex poſt facto* event cannot alter the nature of an *original promiſe*. Their *original* promiſe made them liable, and *bound* them; and they are obliged, both by law, and in honour and honeſty, to perform it.

It is a mercantile tranſaction; and it muſt be conſidered, upon the whole of it, as an admittance "that the defendants either had, "or ſoon would have, effects of *White*'s in "their hands."

* See likewiſe Hardres 72, 73, 74.

Lord MANSFIELD.—The objection is, " that " the letter whereby *Van Mierop* and *Hopkins* " undertake to honour the plaintiffs bills, is " *nudum pactum*." The other ſide deny it.

This is the only queſtion *here*.

But this is quite different from what paſſed at the trial: the *nudum pactum* was not mentioned at *that* time. The grounds it was argued upon *there*, were, 1ſt, That this imported to be a credit given to *Pillans* and *Roſe*, in proſpect of a *future* credit to be given by them to *White*; and that this credit might well be countermanded *before* the advancement of any money: and this is ſo. 2dly, That there was a *fraud*; for that *Van Mierop* and *Hopkins* had reaſon to think that *White had ſent goods to Pillans and Roſe*; whereas this was a mere *lending of credit*. 3dly, That if *Pillans* and *Roſe* had received goods from *White*, and retained them 'till he failed, the defendants undertaking was revocable.

I was then of opinion, that *Van Mierop* and *Hopkins* were *bound* by their letter, *unleſs* there was ſome *fraud* upon them: for that they had engaged under their hands, in a *mercantile tranſaction*, " to give credit for *Pillans* and " *Roſe's reimburſement*." And I did not ſee it to be *future*, as had been objected; nor did I ſee any *fraud*. And nothing was then urged about its being *nudum pactum*.

I have no idea, that promiſes " for the *debt* " *of another*," are applicable to the preſent caſe.

THIS IS (as Mr. *Walker* ſaid) a *mercantile* tranſaction; and it depends upon theſe letters from merchant to merchant about *honouring bills* to ſuch an amount: and this credit is given upon a ſuppoſition, " that the perſon

who

" who is to draw upon the undertakers within
" a certain time, *has goods* in their hands, or *will*
" *have them.*" Here, *Pillans* and *Rose* trusted
to this undertaking: and there is *no fraud.*
Therefore it is quite upon *another foundation*
than that of a *naked* promise from one " to
" pay the debt of another."

Mr. Justice WILMOT.—I own, the *want* of
consideration, *at first*, occurred to me: but *I*
now am satisfied, that this case has nothing to
do with the cases of undertakings by *one* " to
" pay the debt of *another.*" In *those* cases it
is settled, " that where the consideration is
past, the action will *not* lie:" and yet this
seems a *hard* case. The meer promise " to
" pay the debt of another," without *any* con-
sideration at all, is *nudum pactum:* but the
least spark of a consideration will be sufficient.
It seems almost implied, that there must be
some consideration: but *if* there be none at
all, it is *nudum pactum.* The statute must
mean such a special promise as would have
supported an action.

But ALL this is out of the *present* case. So
also, I think, is all the *precedent* correspon-
dence.

It lies in a narrow compass.

White, *Pillans*, and *Rose*, and *Van Mierop* and
Hopkins, had all a correspondence together;
they have intercourse together, mutually, in
mercantile transactions. *Pillans* and *Rose* write
to *Van Mierop* and *Hopkins*, to know " whether
" they will honour their drafts for 800 l. in
" about a month's time." They say, they
will. Now it strikes me, as Mr. *Walker* said,
that it admits " that they either have assets or
" effects of *White*'s in their hands," or " that
" they have credit upon him." Now *by this*
under-

undertaking of a good houſe in London, and relying upon it, they are deluded and diverted from uſing any legal diligence to purſue *White*, or even not to part with any effects of his which they might have in their hands. Therefore this ſeems to be an *irrevocable* undertaking by *Van Mierop* and *Hopkins*: and they ought to be bound by it. Conſequently, there ought to be a new trial.

Lord MANSFIELD.—A letter of credit may may be given as well for money *already* advanced, as for money to be advanced *in future*.

Let it be argued again the next term; and you ſhall have the opinion of the *whole* court. *Ulterius concilium.*

Yeſterday, this matter accordingly came on again; and was argued by Mr. *Wallace*, for the defendant; and by the ſame counſel as argued laſt term; for the plaintiffs.

The latter repeated and enforced their arguments: they ſaid the conſideration moved from *White* to the defendants; not from the plaintiffs *Pillans* and *Roſe*, to the defendants: and as the defendants have undertaken for *White*, they can't revoke or retract their engagement.

This caſe is not like the caſes cited: ſome of which are ſtrange caſes, and not founded on ſolid or ſufficient reaſons; and in others of them, there was *no* meritorious conſideration at all. And Mr. *Walker* cited *Hardres* 71. *Reynolds* v. *Proſſer*; where the conſideration was adjudged ſufficient, notwithſtanding all the reaſoning of Sir *Thomas Hardres*, and all the caſes cited by him.

That was an *aſſumpſit* by a ſtranger, in conſideration that the plaintiff would forbear to proſecute Lord *Abergavenny* upon a judgment,

in

in the name of the original plaintiff, by virtue of a letter of attorney " to receive it to his " own use."

Serjeant *Davy* was heard, this morning, on behalf of the defendants; and urged, that the plaintiffs gave credit to *White*, upon his promising to reimburse them: and he said, there was a fraudulent concealment of facts.

White's *first* letter could have no influence on the plaintiffs. For they *afterwards* desired a confirmed credit upon a house of rank in *London*: so that they did not rely on *White*'s first letter which offered credit on the defendants, *or any other* method of reimbursement. And nothing had *then* passed between *White* and the defendants. For the first letter between them was on the 16th of *February*, (a fortnight after:) and then the defendants were *deceived* into a false opinion " that it was for a *future* " credit, and not to secure a *past* acceptance " of *White*'s bills by the plaintiffs." And this *concealment* of circumstances is sufficient to vitiate the contract. The plaintiffs had accepted a bill of 800 l. of *White*'s, *a fortnight before* the defendant's letter of 16th *February*: which bill the plaintiffs had accepted upon assurance of credit on a house in *London*, to reimburse them. And this transaction was *fraudulently concealed*, both by *White* and the plaintiffs, from the defendants.

If this had been disclosed, the defendants would have plainly seen " that the plaintiffs " *doubted* of *White*'s sufficiency;" by their requiring *further* security for his *already contracted* debt.

All letters of credit relate to *future* credit; not to debts *before* incurred: nor can the advancer

vancer of money thereupon, include an *old* DEBT *before* incurred.

A bill cannot be accepted before it is drawn. This is only a *promise* to accept: for it is *only* a promise "to *honour* the bill; *not* a promise "to *pay* it."

A promise "to pay a *past* debt of another "person" is void at common law, for want of consideration; unless there be at least an implied promise from the debtee "to forbear "suing the original debtor." But here was a debt clearly contracted by *White* with the plaintiffs on the credit of *White*: and there is *no* promise from the plaintiffs "to *forbear* "*suing White.*" A *naked* promise is a *void* promise: the consideration must *be executory*, not *past* or *executed.*

Lord MANSFIELD asked, if any case could be found, where the undertaking holden to be a *nudum pactum* was *in writing.*

Serjeant *Davy.*—It was *antiently* doubted, "whether *a written* acceptance of a bill of "exchange was binding, for want of a con-"sideration." It is so said, somewhere in *Lutwyche.*

Lord MANSFIELD.—This is a matter of great consequence to trade and commerce in every light.

If there was any kind of *fraud* in this transaction, the *collusion* and *mala fides* would have *vacated* the contract: but from these letters, it seems to ME clear, that there was *none.* The *first* proposal from *White*, was "to reimburse "the plaintiffs by a remittance, or by credit "on the house of *Van Mierop.*" This was the *alternative* he proposed. The plaintiffs chose the *latter.* Both the plaintiffs and *White* wrote to *Van Mierop* and company; they answered,

2 "that

"that they would *honour* the plaintiffs draft."
So that the *defendants assent to the proposal made by White, and ratify it.* And it does not seem at all, that the plaintiffs then doubted of *White*'s sufficiency, or meant to conceal any thing from the defendants.

If there be *no* fraud, it is a mere question of *law.* The law of *merchants*, and the law of the *land*, is the *same.* A witness cannot be admitted, to prove the *law* of merchants. We must consider it as a point of *law.* A *nudum pactum* does not exist, in the usage and law of merchants.

I take it, that the ancient notion about the want of consideration was for the sake of *evidence* only: for when it was reduced into *writing*, as in covenants, specialties, bonds, &c.* there was no objection to the want of consideration. And the statute of frauds proceeded upon the same principle.

In *commercial* cases amongst merchants, the want of consideration is *not* an objection.

This is just the same thing as if *White* had drawn on *Van Mierop* and *Hopkins*, payable to the plaintiffs: it had been nothing to the plaintiffs, whether *Van Mierop* and *Co.* had *effects* of *White*'s in their hands, or not; *if* they had *accepted* his bill. And this amounts to the same thing:—"I will give the bill due "honour," is, in effect, *accepting* it. If a man agrees "that he will do the formal part," the law looks upon it (in the case of an acceptance of a bill) as if *actually done.* This is an engagement "to accept the bill, if there "was a necessity to accept it; and to pay it, "when due:" and they *could not afterwards retract.* It would be very destructive to trade and to trust in commercial dealings, if they could.

* Vide 3 Burr. 1639.

could. There was nothing of *nudum pactum* mentioned to the *jury*; nor was it, I dare say, at all in *their* idea or contemplation.

I think the point of *law* is with the plaintiffs.

Mr. Justice Wilmot.—The question is "whether this action can be supported, upon "the *breach* of this agreement."

I can find none of those cases, that go upon its being *nudum pactum*, that are in *writing*: they are all upon *parol*.

I have traced this matter of the *nudum pactum*: and it is very curious.

He then explained the principle of an agreement being looked upon as a *nudum pactum*; and how the notion of a *nudum pactum* first came into *our law*.

He said it was echoed from the *civil law*,— "*Ex nudo pacto non oritur actio.*" *Vinnius* gives the reason, in *lib.* iii. tit. *De Obligationibus*, 4to. edition, 596. If by *stipulation*, (and *à fortiori*, if by *writing*,) it was good *without* consideration. There was no *radical* defect in the contract, for want of consideration: but it was made requisite in order to put people upon attention and reflection, and to prevent obscurity and uncertainty: and in that view, either *writing* or certain *formalities* were required. *Idem.* on *Justinian*, 4to. edit. 614.

Therefore it was intended as a guard against rash inconsiderate declarations; but if an undertaking was entered into upon *deliberation* and *reflection*, it had activity; and such promises were *binding*. Both *Grotius* and *Puffendorf*, hold them *obligatory* by the law of nations. *Grot. lib.* ii. *c.* 11. *De Promissis. Puffend. lib.* iii. *c.* 5. They are *morally* good; and only require *ascertainment*: therefore there is no reason

reason to *extend* the principle, or carry it *further*.

There would have been no doubt upon the present case, according to the *Roman* law; because here is both *stipulation* (in the express *Roman* form) and writing.

Bracton (who wrote * *Temp. Hen. III.*) is the first of *our* lawyers that mentions this. His writings interweave a great many things out of the *Roman* law. In his third book, *cap.* 1. *De Actionibus*, he distinguishes between *naked* and *cloathed* contracts. He says that "*obligatio* "*est mater actionis*;" and that it may arise *ex contractu, multis modis*; *sicut ex conventione, &c. sicut sunt pacta, conventa, quæ nuda sunt aliquando, aliquando vestita, &c. &c.*

* Sub ultima tempora Regis H. III.

Our *own* lawyers have adopted exactly the same idea as the *Roman* law. † *Plowden* 308. b. in the case of *Sharyngton* and *Pledal.* v. *Strotton* and *others*, mentions it: and no one contradicted it. He lays down the distinction between contracts or agreements in words (which are more base,) and contracts or agreements in writing, (which are more high;) and puts the distinction upon the want of deliberation in the former case, and the full exercise of it in the latter. His words are the marrow of what the *Roman* lawyers had said. "*Words* "pass from men *lightly*:" but where the agreement is made by *deed*, there is more time for deliberation. For when a man passes a thing by deed, first, there is the determination of the mind to do it, and upon that he causes it to be written, which is one part of deliberation, and afterwards he puts his seal to it, which is another part of deliberation; and lastly, he delivers the writing as his deed. "The *delivery* of the deed is a ceremony in "law,

† This probably was Plowden's own argument. Sir J. Burr. supposes he was of himself that apprentice of the Middle Temple who argued for the defendants.

" law, signifying fully his good will that the " thing in the deed should pass from him who " made the deed, to the other. And there- " fore a deed, which must necessarily be made " upon great thought and deliberation, shall " bind, without regard to the consideration."

The *voidness* of the consideration is the *same*, in reality, in both cases: the *reason* of adopting the rule was the *same*, in both cases; though there is a difference in the *ceremonies* required by each law. But *no inefficacy* arises *merely* from the naked promise.

Therefore, if it stood *only* upon the naked promise, it's being, in this case, reduced into *writing*, is *a sufficient guard against surprize*: and therefore the rule of *nudum pactum* does not apply in the present case.

I cannot find, that a *nudum pactum evidenced by writing* has been ever holden bad: and I should think it good: though where it is *merely verbal*, it is bad. Yet I give *no opinion* upon it's being good, *always*, when in *writing*.

Many of the old cases are strange and absurd: so also are some of the modern ones; particularly, that of *Hayes* v. *Warren* *. The reason of the reversal of the judgment was, " that it did not appear by the declaration, to " be either for the *benefit*, or at the *request* of " the defendant."

* Vide 2 Sir J. S. 933.

It is now settled, " that where the act is " done at *the request* of the person promising, " it will be a sufficient foundation to graft the " promise upon."

In another instance, the strictness has been relaxed: as for instance, † burying a son; or ‡ curing a son; the considerations were both *past*; and yet holden good. It has been melting down into common sense, of late times.

† Church and Church's case, cited in Raym. 260.

‡ Vide 2 Leon 111.

However

However, I do here see a *consideration.* If it be a *departure from any right,* it will be *sufficient* to graft a *verbal* promise upon. Now here, *White* living in *Ireland,* writes to the plaintiffs "to honour his drafts, for 800l. * *payable ten weeks after.*" The plaintiffs agree to it, on condition that they be made safe at all events. *White* offers good credit on a house in *London,* and draws: and the plaintiffs accept his draft. Then *White* writes to them, "to draw on *Van Mierop* and *Hopkins:*" to whom the plaintiffs write, "to inquire if they "will honour their draft?" They engage "that they will." This transaction has *prevented, stopt,* and *disabled* the plaintiffs from calling upon *White,* for the performance of his engagement. For *White*'s engagement is *complied with:* so that the plaintiffs could not call upon *him* for this security. I do not speak of the *money;* for *that* was not payable 'till after two usances and a half. But the plaintiffs were prevented from calling upon *White* for a performance of his engagement "to give "them *credit on a good house in London,* for "*reimbursement:*" so that here *is* a *good* consideration. The law does not weigh the *quantum* of the consideration. The *suspension* of the plaintiff's right "to call upon *White* for a "compliance with his engagement," is *sufficient* to support an action; even if it be a suspension of the right, for *a day only,* or for *ever so little* a time.

* For between Ireland and Holland, each usance is one month.

But to consider this as a *commercial* case. ALL nations ought to have their laws conformable to each other, in *such* cases. *Fides servanda est; simplicitas gentium prævaleat. Hodierni mores* are such, that the old notion about the *nudum pactum* is *not* strictly observed as a rule.

On a queſtion of this nature, "whether by "the *law of nations*, ſuch an engagement as "this ſhall bind?"—The *law* is to judge.

The *true reaſon why the acceptance* of a bill of exchange ſhall bind, is not on account of the acceptor's having or being ſuppoſed to have effects in hand; but for the convenience of trade and commerce. FIDES *eſt ſervanda*. An acceptance *for the honour* of the drawer, ſhall bind the acceptor: ſo ſhall a *verbal* acceptance. And whether this be an *actual* acceptance, or an *agreement* to accept, it *ought equally to bind*. An agreement "to accept a "bill *to be* drawn in future," would (as it ſeems to me) by connexion and relation, bind, on account of the antecedent relation. And I ſee no difference between it's being *before* or *after* the bill was drawn. Here was an agreement ſufficient to bind the defendants *to pay* the bill: agreeing "*to honour* it," is agreeing to *pay* it.

I ſee no ſort of fraud; it rather ſeems as if the defendants *had* effects of *White*'s in their hands. And it does not appear to me that the defendants would not have honoured the plaintiffs drafts, even though they had *known* that it was *future* credit.

But whether the plaintiffs or the defendants had effects of *White*'s in their hands, or not; we muſt determine on the *general* doctrine.—And I am of opinion, that there ought to be a new trial.

Mr. Juſtice YATES was of the ſame opinion. He ſaid it was a caſe of great conſequence to *commerce*: and therefore he would give both his opinion and his reaſons.

The arguments on the ſide of the defendants terminate in its being a *nudum pactum*, and *therefore void*.

This

This depends upon two queſtions.

1ſt. Queſtion.—"Whether this *be* a pro-"miſe *without* a conſideration?"

2nd. Queſtion.—If it is, then "Whether "this promiſe ſhall not be *binding*, of itſelf, "*without* any conſideration?"

Firſt,—The draft drawn by *White* on the plaintiffs, payable to *Clifford*, is *no part* of the conſideration of the undertaking by the defendants. The draft payable to *Clifford* is never mentioned to the defendants. They are aſked, "whether they will anſwer a draft from "the plaintiffs *upon them?*" They anſwer, "they will honour ſuch a draft *upon them*."

Whether the defendants had or had not *effects of White*'s in their hands, is immaterial.

Any * *damage* to another, or *ſuſpenſion*, or *forbearance* of his *right*, is a foundation for an undertaking, and will make it binding; though *no actual benefit* accrues to the *party undertaking*.

* Vide Coggs v. Bernard. 2 Ld. Raym. 919

Now here, the promiſe and undertaking of the defendants did occaſion a poſſibility of loſs to the plaintiffs. It is plain that the plaintiffs would *not* rely on *White's aſſurance* ONLY; but *wrote to the defendants*, to know if they would accept their drafts? The credit of the plaintiffs might have been hurt, by the refuſal of the *defendants* to accept *White*'s bills. They were or might have been prevented from *reſorting to him*, or getting *further ſecurity from him*. It comes within the caſes of promiſes, where the debtee *forbears ſuing* the original debtor.

Second queſtion.—Whether, by the *law of merchants*, this contract is not binding on the defendants; *though* it was without conſideration?

The *acceptance* of a bill of exchange is an obligation to pay it; the end of their inſtitution, their currency, requires that it ſhould be

 ſo.

so. On *this* principle, bills of exchange are considered, and are declared upon as *special* contracts; though *legally* they are only *simple* contracts: the declaration sets forth the *bill and acceptance specifically*; and that thereby the defendants, by the custom of merchants, became liable to pay it.

This agreement, " to honour their bill" was a *virtual* acceptance of the bill. An acceptance needs not be *upon the bill itself*; it may be by *collateral writing. Wilkinson* v. *Lutwidge*. 1 *Strange* 648.

A PROMISE " *to accept*" is the same as an *actual* acceptance. And a small matter amounts to an acceptance: and so says *Molloy*, *lib*. ii. *c*. 10. §. 20. And an acceptance will *bind*, though the acceptor has *no effects* of the drawer in his hands; and *without any consideration*. *Symons* v. *Parminster*, * *Hil*. 1747. 21. *G*. 2. *B. R.* And a bill accepted for the honour of the drawer, will also bind.

* This was on a motion in arrest of judgment. The judgment was affirmed (ex parte) in Dom. Proc. with 100l. costs, upon or soon after 20th Feb. 1748.

Then he applied these positions to the present case. It was an acceptance of this very draft, *by relation and connexion*; though the bill was not then drawn by the plaintiffs on the defendants.

But even if it did not amount to an *actual* acceptance, yet it would *equally bind* the defendants; they would be equally obliged to perform the *effect* of their undertaking.

The plaintiffs apprized the defendants of their *intention to draw*; and the defendants promised to " *honour their draft*:" and the plaintiffs, of course, would regulate their conduct accordingly.

Therefore, upon the whole circumstances of this transaction, 1st. There *is* a consideration: and

and 2dly. If there was none; yet, in this *commercial* case, the defendants would be bound.

Mr. Justice Aston.—I am of opinion, "that there ought to be a new trial."

If there be such a custom of merchants as hath been alledged, it may be *found* by a jury: but it is the *court*, not the jury, who are to determine the LAW.

This must be considered as a *commercial* transaction; and is a plain case. The defendants have undertaken "*to honour the plaintiffs* "*draft*;" therefore they are *bound to pay it*.

This cannot be called a *nudum pactum*. The answer returned by the defendants is an admission of "*having effects of White's in their* "*hands*," if that were *necessary*. And after this promise "to accept," (which *is an implied acceptance*) they might have applied any thing of *White*'s that they had in hand, to this engagement: even though *White* had drawn other bills upon them in the *interim*. The defendants voluntarily engaged to the plaintiffs: and they *could not recede* from their engagement.

As to it's being a *nudum pactum* (which matter has been already so well explained) if there be turpitude or illegality in the consideration of a note, it will make it void, and may be given in evidence: but here nothing of that kind appears, nor any thing like fraud in the plaintiffs. Here was full notice of all the facts; a clear apprehension of them by the defendants; a question put to them, "whether "they would accept?" and their answer, "that they would."

Upon the whole, he concurred, "that an "action will lay for the plaintiffs against them; "and that the plaintiffs ought to recover."

By the court, unanimously,

The rule "to *ſet aſide the verdict*, and for a "*new trial*," was made ABSOLUTE.

Goſlin v. Wilcock. E. 6 G. 3. C. B. 2 Wilſon. 302.
An action lies for ſuing plaintiff in an inferior court maliciouſly, and arreſting him, when that court had not any juriſdiction of the cauſe.
Verdict for plaintiff—Motion to ſet it aſide, on the ground that the evidence did not ſupport the declaration—New trial refuſed, the juſtice of the caſe being with the plaintiff, &c.

A new trial was refuſed, though the declaration was faulty in not alledging that the defendant knew the inferior court had no juriſdiction of the cauſe.

Special action upon the caſe, wherein the plaintiff declares, that whereas by the laws of this realm no perſon ought to be arreſted, impleaded or impriſoned without a probable cauſe of action againſt him, yet the defendant *falſely* [illegible] action, in the king's court of record, held at and for the borough of *Bridgewater*, in *Somerſetſhire*, on the 30th of *September*, 1765, levied a plaint againſt the plaintiff in a plea of treſpaſs upon the caſe to the damage of 10 l. and afterwards at the ſame court, on the ſame day, ſued out upon the ſaid plaint a writ of *capias ad reſpondendum* directed to the bailiffs of the borough, to take the plaintiff, and have his body before the judges of that court on *Monday* after the ſervice of that writ, to anſwer the defendant in the ſaid plea; which writ the defendant *falſely and maliciouſly* cauſed to be indorſed for bail for 5 l. 3 s. 11 d. againſt the plaintiff; and the defendant further *falſely and maliciouſly*, and without any probable cauſe, afterwards on the 3d. of *October*, 1765, at the ſaid borough, cauſed the plaintiff to be arreſted, and kept in cuſtody 24 hours, without *any probable cauſe, when in truth and in fact the defendant had not, at the time of levying the plaint, or of the ſaid arreſt and impriſonment, any juſt or probable cauſe of action againſt the plaintiff, for which he ought to have been arreſted and impriſoned*; and the defendant hath not declared againſt the plaintiff in that plea, nor further proſecuted his ſaid plaint, but hath diſcontinued the ſame, and the ſaid ſuit is long ſince ended and determined; and the plaintiff in fact ſays, that by means of the

premiſes,

premises, he is greatly injured and damnified, and hath been put to great charges in freeing himself from the said imprisonment, and forced to undergo grievous pains of body and mind, and during his imprisonment, was hindered from exercising his lawful employment, trade, and business, and lost the whole profit thereof, at the borough aforesaid: to his damage of fifty pounds. The defendant pleaded *not guilty* of the premises laid to his charge, and thereupon issue was joined.

This cause was tried at the last *Somersetshire* assises, before Mr. Justice *Aston*, at *Taunton*, when the jury gave a verdict for the plaintiff, and 5 l. damages. The judge reported that it appeared in evidence at the trial, that the plaintiff and defendant both lived at *Taunton*, a quarter of a year together; that the plaintiff was all that time indebted to the defendant in about 5 l. upon a contract at *Taunton*, where the plaintiff appeared publicly, and might have been arrrested for the same *there*, at any time; that the defendant said, that if he could not do for the plaintiff at *Taunton*, he would do for him at *Bridgewater*; that afterwards at the fair at *Bridgewater*, when the plaintiff was standing at his stall *there*, exposing his goods to sale, the defendant came along with the bailiffs to the stall, and said to the bailiffs, *there is the rogue, there is your prisoner*; whereupon they instantly arrested the plaintiff in the fair: the *plaint* levied, and the *capias* indorsed for bail were also proved; there was likewise evidence of the injury the plaintiff suffered, and the expences he was put to, on this occasion. There was not any witness called for the defendant, but it was admitted that he discontinued his action in the borough, when

he knew it would not lie there, and that he brought another action against the plaintiff, for what he owed him, and had got a verdict at that assizes for the same; so that there really was a debt owing by the plaintiff to the defendant, at the time the plaintiff was arrested at the suit of the defendant, in the borough-court of *Bridgewater*; though it was not contracted within that jurisdiction: but the judge was of opinion, that the arrest *there* at the time of the fair, was done *maliciously*, and was satisfied with the verdict.

A motion was made for a new trial, because the evidence did not support the declaration, (with leave given to the defendant at the same time to move in arrest of judgment in case he should not succeed in this motion;) it was objected, that the gist of this kind of action is *malice*; as where a man *maliciously* arrests another, when there is really *no debt* at all owing, or where one maliciously arrests another, for a far larger sum than is really due, with an intent to oppress him, and prevent his friends from being bail for him; but the *malicious intention* must clearly be made to appear, and must be expressly averred in the declaration. In the present case it appears there was really and *bonâ fide* a debt of 5 l. and upwards owing from the plaintiff to the defendant, at the time of the arrest at *Bridgewater*; and that the defendant not knowing but that he might lawfully sue plaintiff *there*, caused him to be arrested there; but as soon as he was informed that court had no jurisdiction, he discontinued his action, and brought another in a superior court, and has recovered: so there appears no malice in the case. 2dly, It was objected that an action will not lie either against the

judge,

judge, officer, or party, for arresting a man in an inferior court, when there is no cause of action within that jurisdiction; and the case of *Temple* v. *Killingworth*, *B. R. Hil.* 2 *W.* & *M. Rotulo* 725. *Carth.* 189. 1 *Show.* 254. *S. C.* 12 *Mod.* 4. *S. C.* was cited as in point, wherein the plaintiff declared thus, *viz.*

" Petrus Temple queritur de Samuele " Killingworth in custodia marescalli mares- " caltiæ, &c. pro eò videlicèt quod prædic- " tus Samuel machinans & malitiosè inten- " dens eundem Petrum magnoperè prægra- " vare & minùs justè opprimere 25 die A- prilis, anno regni domini regis & dominæ " reginæ nunc primo, injustè & malitiosè " apud London prædictum in parochia, &c. " in warda, &c. prætextu & colore cujusdam " prætensæ querelæ in curiâ dictorum domini " regis & dominæ reginæ ad tunc tenta co- " ram Johanne Flint, milite, tunc uno vice- " comitum civitatis Londini prædicti, in com- " putatorio suo scituato in parochia & warda " prædictis, intratæ & levatæ ad sectam ip- " sius Samuelis super quandam prætensam " actionem ad magnum prætensam damnum " ipsius Samuelis arrestari & imprisonari ibi- " dèm causavit & procuravit, ac prædictum " Petrum in prisona & custodia ibidèm, rati- " one arrestationis prædictæ, per magnum " tempus scilicèt per spatium sex dierum de- " tineri fecit, pro defectu sufficientium manu- " captorûm & securitatis ad prætensam actio- " nem prædictam pro prædicto prætenso " damno; ubi re verâ & in facto prædictus " Samuel tempore arrestationis & imprisona- " menti ipsius Petri prædicti ut præfertur, " vel ad aliquod tempus anteà, nullam ha- " buit causam actionis versus præfatum Pe-

" trum

"trum infra jurisdictionem ejusdem curiæ,
"ratione quorum quidem injustè malitiosè
"arrestationis & imprisonamenti prædicti ip-
"sius Petri, ipse idem Petrus non solùm in
"prisona & custodia per totum tempus præ-
"dictum detentus, & de libertate sua depri-
"vatus fuit super prædictam prætensam ac-
"tionem ob prætensum damnum prædictum;
"verum etiàm magnos labores & expensas
"pro relaxatione sua ab arrestatione & im-
"prisonamento illius erogavit ac subire & ero-
"gare compulsus fuit, unde dicit quod de-
"terioratus est & damnum habet ad valen-
"ciam quingentarum librarum, & inde pro-
"ducit sectam, &c."

The defendant pleaded the general issue *not guilty*, and there was a verdict for the plaintiff. It was moved in arrest of judgment, that the plaintiff (when he was defendant below) ought to have pleaded to the jurisdiction of the sheriffs court, and if the plea had been refused, then a prohibition would have been granted; the court inclined to that opinion, and judgment was stayed 'till the plaintiff should move it again; and afterwards the plaintiff moved for judgment, and the cases in * the margin were cited to maintain the action; but the court was not satisfied with the action. There does not appear any judgment entered upon the roll. In *Shower* 254. *S. C. Holt*, C. J. said the point was fit to be considered by all the judges; and in 12 *Mod.* 4. *S. C. Holt*, C. J. said that of late it is held that *case* will not lie for prosecution in an inferior court, where the court has not jurisdiction; that the first case in point was at *Huntingdon* assizes, and referred to the *C. B.* and there adjudged, that for suing one with-

* Hob. 105. Cro. Jac. 667. Cro. El. 628, 636. Stat. 3 Ed. I. cap. 38. Regist. 98. F.N.B. 45. (F) 1 Sand. 221. Sid. 463. 4 Rep. 14. b. 1 Vent. 369.

out

out any cauſe of action at all, no action lies, unleſs it appears to be with a *malicious* and *vexatious* deſign; eight of the judges ſeemed to think the action would not lie.

It was anſwered by the counſel for the plaintiff, that it appears by the judge's report, in this caſe at bar, from the time, place, and every circumſtance attending the arreſt at *Bridgewater*, that it was done with a *malicious* deſign to injure the plaintiff in the ſale of his goods at the fair, and to expoſe him to his cuſtomers; the defendant muſt certainly know, that the borough-court at *Bridgewater* had no juriſdiction, and his diſcontinuing the action, after he had executed his malicious deſign, will not avail him; and 2dly, That it is a rule in law, that whereſoever a man ſuffers an injury, joined with a loſs, the law ſhall give him a remedy and recompence, *Hob.* 45. and no remedy or ſatisfaction can be had in this caſe, unleſs this action will lie; for falſe impriſonment certainly will not lie. *Gwinne* v. *Poole & al'.* 2 *Lutw.* 935. 1571, 1572. And that an action will lie for ſuing in an inferior court, without any cauſe of action within the juriſdiction was held good, was cited, 2 *Shower.* 328. *Hudſon* v. *Cocke.*

In reply to the caſe of *Hudſon* v. *Cooke*, was cited what Sir *John Powell* ſaid in his learned argument in the caſe of *Gwinne* v. *Poole*, 2 *Lutw.* 1571, 2. in regard to the caſe of *Hudſon* and *Cooke*: "I was preſent," (ſays he,) "when the caſe of *Hudſon* and *Cooke* was "adjudged: it was an action upon the caſe, "brought againſt the defendant, for com- "mencing an action in an inferior court, "where the cauſe of action aroſe out of the "juriſdiction of that court; not guilty was

"pleaded,

" pleaded, and a verdict for the plaintiff;
" and an exception was taken in arrest of
" judgment, for that it was not shewn that
" the defendant knew that the place where
" the action arose, was out of the jurisdiction:
" but it was held by *Jefferys*, *Holloway* and
" *Walcot*, that it was aided by the verdict;
" *Withens* Justice being of a contrary opinion:
" I confess, says he, that I then thought it
" strange that the *gist* of the action should be
" aided by the verdict:" therefore the defendant's counsel insisted this case of *Hudson* and *Cooke* is not law.

Lord *Camden*: Baron *Powell*, in his argument of *Gwinne* and *Poole*, has stated the learning of cases of this kind, but hath not laid down any precise rule of law: this is a nice case, and is to be looked into with precision. There are no cases in the old books of actions for suing where the plaintiff had no cause of action; but of late years, when a man is *maliciously* held to bail, where nothing is owing, or when he is *maliciously* arrested for a great deal more than is due, this action has been held to lie; because the costs in the cause are not a sufficient satisfaction for imprisoning a man unjustly, and putting him to the difficulty of getting bail for a larger sum than is due. Whenever this kind of action is brought, the particular *gravamen* must be alledged in the declaration, and it must be laid that it was done *maliciously, and with an intent to injure and oppress*. The fact of the evidence in the present case is, that the defendant at *Bridgewater* said, "*I know I can catch you here,* "*though I could not at Taunton*;" but this doth not prove that he might not think that the action would lie at *Bridgewater*; and it

seems

ſeems to me that he did not know to the contrary when he levied his plaint; becauſe as ſoon as his attorney informed him that it would not lie *there*, he diſcontinued his ſuit. I think the declaration is ill, becauſe it is not alledged in the declaration, that the defendant knew that the place where the cauſe of action aroſe, was out of the juriſdiction of the borough-court of *Bridgewater*, and that the caſe proved at the aſſizes, is different from the caſe ſtated in the declaration: and if it be ſo, we ought to grant a new trial.

Clive Juſtice: This is the firſt action of the kind I have ever ſeen brought for ſuing in an inferior court which has not juriſdiction; and I am inclined to think the declaration will not ſupport the evidence.

Bathurſt Juſtice: This is a motion for a new trial, as being a verdict againſt evidence: I cannot help agreeing with the judge who tried this cauſe, that the arreſt at *Bridgewater* was *maliciouſly* done; it then comes to this queſtion, whether an action upon the caſe will not lie for ſuing in an inferior court which has not juriſdiction, with the circumſtances of *malice*, which manifeſtly appear; and I am very clear that it will lie, but think this declaration is not rightly drawn: it ought to have alledged that the defendant knew that the cauſe of action did not ariſe within the juriſdiction of the court at *Bridgewater*, and then it would have been right enough. But the court can ſee, in this caſe, that juſtice and equity are with the plaintiff, and they will never grant new trials, where the verdict is on the honeſt ſide of the cauſe. The caſe of *Smith* v. *Page*, 2 *Salk.* 644. is a very ſtrong caſe to this purpoſe: in ejectment, the plaintiff

Vide poſt V.

tiff was a mortgagee, and claimed by ſurrender, whereas the land was not copyhold, and the defendant claimed only by a voluntary conveyance: the verdict was for the plaintiff, and the court of *B. R.* would not ſet it aſide, and grant a new trial againſt the honeſty of the cauſe. So in the preſent caſe, I think the honeſty of the cauſe is with the plaintiff, and therefore I am for ſupporting the verdict if poſſible. When a defendant has got a verdict in a hard action, the court will not grant a new trial, and in many caſes, as in *qui tams*, no new trial is ever granted, where the defendant has got a verdict.

Gould Juſtice: I am of the ſame opinion with my brother *Bathurſt*, as to the malice in the defendant, and the juſtice of the plaintiff's caſe, and think the defendant was conſcious that he had no right to arreſt the plaintiff at *Bridgewater*; and the court will *be aſtute* to ſupport this verdict, as they ſee it is on the ſide of juſtice, and will not grant a new trial. I am inclined to think this declaration is well enough, for it is alledged, *That the defendant maliciouſly, without any probable cauſe, at the ſaid borough, cauſed the plaintiff to be arreſted; when in truth and in fact the defendant had not at the time of the levying the plaint, or of the arreſt and impriſonment, any juſt or probable cauſe of action, for which he ought to have been arreſted and impriſoned.*

I think this is a ſubſtantial diſcloſure and allegation of his cauſe of action, and was ſufficient notice to the defendant, to come with proof, and ſhew at the trial that he had a cauſe of action, ariſing within the juriſdiction of the court at *Bridgewater*; and that the plaintiff in his declaration was not obliged to aver,

that

that the defendant knew that his cauſe of action did not ariſe within the juriſdiction of that court, for this is matter of evidence, which no man is obliged to ſet out in his pleadings. As at preſent adviſed, I think this declaration is ſubſtantially good: but ſuppoſing it is not, *yet* in ſuch a caſe as this, we ought not to grant a new trial.

The court being divided, took time to conſider; and afterwards, in this ſame term, Lord *Camden* and Mr. Juſtice *Clive* agreed in opinion with Mr. Juſtice *Bathurſt* and Mr. Juſtice *Gould*, to refuſe a new trial.

Lord *Camden:* I think, upon further conſideration, that as the juſtice and equity of the cauſe is on the ſide of the verdict, we ought not to grant a new trial. I ſhall always be willing to grant a new trial, where the equity and juſtice of the caſe is with him who prays it, if the law and circumſtances of the caſe will permit; and ſhall be as willing to refuſe a new trial, where I am warranted to do ſo by precedents. The granting new trials began within the time of memory, and I will not extend the practice of granting them further than precedents have already gone. This is an action for bringing a ſuit at law; and courts will be cautious how they diſcourage men from ſuing; where a party has been *maliciouſly* ſued and held to bail, *malice, and that it was without any probable cauſe,* muſt be alledged and proved. Upon more mature conſideration, we are all now of opinion, that if you hold a man to bail in an inferior court, when you know it hath not juriſdiction, and *with malice*, an action upon the caſe will lie. And that if the plaintiff had averred, that the defendant knew that his cauſe of action

9 did

did not arise within the jurisdiction of the court of *Bridgewater*, we are all clear of opinion the declaration would have been good; *that single averment*, together with *malice*, would have been sufficient without any other. The plaintiff and defendant lived in the same town of *Taunton*, a quarter of a year together, and the defendant (to whom he was indebted all that time,) never sued him there, (though it is not pretended but the plaintiff always appeared publicly,) but the defendant follows him to *Bridgewater*, and abuses him *there* publicly, and arrests him in the fair at his stall, when the defendant must know that the court *there* had no jurisdiction; we are forced to say the verdict is according to the justice of the case, and on a motion for a new trial we are desired to grant it for a fault in the declaration, against the justice of the case; but if I had only the case of *Deerly* v. *the dutchess of Mazarine*, 2 *Salk*. 646. to warrant me (though the jury were liable to an attaint in that case,) I would not grant a new trial in the present case.

Vide post V.

So a new trial was refused by the whole court.

Swain v. Hall, H. 10 G. III. 3 Wils. 45. A new trial was refused, though the Chief Justice reported that the strength of the evidence was against the verdict; the jury being the legal, constitutional judges of the fact.

Covenant upon a lease made by plaintiff to defendant, of a house called the *Oxford-arms*, for the term of twenty-four years, in consideration of 670 l. in hand paid by defendant to plaintiff, and of the yearly rent of 142 l. wherein the defendant (amongst others things) covenanted to lay out 400 l. in repairing the premises, and also covenanted to keep and leave the same in good and tenantable repair, at the end of the term. Whereupon the plaintiff assigned two breaches; 1st, That the defendant did not lay out 400 l. in repairing the premises; 2dly, That the defendant did not leave

leave the ſame in good and tenantable repair, at the end of the term. The defendant pleaded, that he did lay out 400 l. in repairing the premiſes, and thereupon iſſue was joined; he alſo pleaded that he did leave the premiſes in good and tenantable repair, at the end of the term, and thereupon iſſue was alſo joined.

Upon the trial before Lord Chief Juſtice *Wilmot*, upon the firſt iſſue it was clearly proved, on behalf of the defendant, that he had laid out 400 l. in repairing the premiſes, ſo that the counſel for the plaintiff wholly gave up that iſſue; as to the ſecond iſſue, it ſeems there was a contrariety of evidence; and the Chief Juſtice, in ſumming it up to the Jury, was pleaſed to intimate to them, that he thought the weight of evidence was with the plaintiff; but they found a verdict for the defendant upon both iſſues.

Serjeants *Davy* and *Burland* for the plaintiff moved for a new trial, upon this ground, *viz.* that, as to the ſecond iſſue, the verdict was againſt evidence; for that in fact there was no direct or poſitive evidence given on the ſide of the defendant, that he left the premiſes in good and tenantable repair at the end of the term, and they appealed to the Lord Chief Juſtice's notes: whereupon the court made a rule to ſhew cauſe why there ſhould not be a new trial.

Upon ſhewing cauſe, the Chief Juſtice made his report; after ſtating the two iſſues as above, he laid the firſt entirely out of the caſe, as being clearly with the defendant. As to the ſecond iſſue, he ſaid, the plaintiff called and examined three witneſſes.

Mr. *Flight*, the firſt witneſs, ſaid he was a ſurveyor; that in *April* laſt, a day or two after old *Lady-day* 1769, when the leaſe expired, he ſurveyed the houſe and premiſes in queſtion; that he found the roof much out of repair; that it rained in; that there were ten loads of rubbiſh in the garrets; that there was no ſell, nor any glaſs in ſome of the windows; and that the premiſes were not left in tenantable repair; but he made no eſtimate how much it would coſt to put the ſame into ſuch tenantable repair, as a tenant after a leaſe of twenty-four years ought to have left the ſame.

The ſecond and third witneſſes for the plaintiff were *William Smith* and —— *Wood*, two ſurveyors, who ſaid, that in *April* laſt, about the end of the ſaid term of years, they ſurveyed the premiſes together, and made a particular eſtimate in writing, and ſigned it, how much it would coſt to put the premiſes in ſuch tenantable repair as the defendant ought to have left the ſame, which they eſtimated at 105 l. 18 s. 9 d. and ſaid *that* was a fair eſtimation between a landlord and a going-out tenant; that they were employed to ſurvey on the part of the plaintiff; that the defendant, *Hall*, was preſent, and refuſed to employ a ſurveyor on his ſide; but that if they had been employed by him, they ſhould have made the ſame eſtimate: they exactly agreed in their account of this matter. This is the whole of the evidence for the plaintiff.

For the defendant two witneſſes were called. Mr. *Frazier*, the firſt witneſs, ſaid he was a ſurveyor, and was employed to ſurvey this houſe; he ſwore he thought, that at the time of the defendant's quitting it, at the expiration of the leaſe, it was in tenantable repair: his very

words were, " That according to the beſt of
" his judgment, he ſhould have been obliged
" to a tenant to have left a houſe of his ſo
" well, and could not expect to have one left
" in better repair." He ſaid, " that there
" was a great difference between repairs as to
" a tenant's going out, and a tenant's coming
" into a houſe."

Mr. *Sum[illegible]ton*, the ſecond witneſs for the defendant, ſwore that he was a ſurveyor; that he was recommended to the defendant *Hall*, to ſurvey the premiſes, in order for *Hall* to take a new leaſe; that he did make a general ſurvey, and was in every room in the houſe; and ſaid, upon the whole, that he thought the landlord ſhould have been contented; that if he had been the landlord he ſhould have been contented with the condition the premiſes were left in when *Hall* quitted the ſame. The Chief Juſtice ſaid this was a very fair and candid witneſs; that he gave both *Wood* and *Smith*, the plaintiff's witneſſes, very good characters; ſaid that *Smith* was a man of knowledge and capacity; and that *Flight*, the firſt of the plaintiff's witneſſes, was an eminent man in his buſineſs.

This is the whole of the evidence as to the ſecond iſſue. Whereupon the Chief Juſtice ſaid, he ſtill thought the weight of evidence was on the ſide of the plaintiff; but notwithſtanding his opinion, after hearing Serjeants *Nares* and *Leigh* for the plaintiff, and Serjeants *Davy* and *Burland* for the defendant, there being evidence on both ſides, the court refuſed to grant a new trial. The Chief Juſtice ſpoke to the following effect:

WILMOT, *Chief Juſtice*. Where verdicts have been given contrary to evidence, or where

 there

there hath been no evidence at all to ſupport ſuch verdicts, the court hath granted new trials; but if there hath been a contrariety of evidence on both ſides, the courts have never granted new trials, notwithſtanding the judge before whom the cauſe was tried hath been of opinion, that the ſtrength and weight of evidence was againſt the verdict. In the preſent caſe, there was a contrariety of evidence on both ſides; and although I am ſtill of opinion, that the weight of evidence was with the plaintiff, yet I diſclaim any power to controul this verdict of the jury, who are the LEGAL CONSTITUTIONAL JUDGES of the fact.

N. B. Some days after the court refuſed a a new trial in this caſe, the chief juſtice ſaid, that it could not have been ſent to be tried again upon one of the iſſues, but it muſt have gone back on the whole record; *viz.* upon both the iſſues; and that one iſſue being clearly with the defendant, there was no foundation or pretence for a new trial on that iſſue: and he cited the caſe of *Rowland* v. *Vanbalken*, *C. B. Eaſter* term, 1 *Geo. I.* from *J. Tracey*'s notes, where it was ſo determined.

Norris v. Tyler. E. 14. Geo. III. B. R. Cowp. 37. In an action for a malicious proſecution, verdict in favour of the defendant refuſed to be ſet aſide, though againſt evidence.

This was an action for a malicious proſecution, in preferring a bill of indictment againſt the plaintiff, for forging a note of hand. Four witneſſes were called to prove that the handwriting was not the plaintiff's, and the judge directed the jury in his favour: but the jury found a verdict for the defendant. Upon a motion for a rule to ſhew cauſe why the verdict ſhould not be ſet aſide, as being a verdict againſt evidence, and a new trial granted, the court ſaid the defendant had been ſufficiently tried once, where the ſuit was of a criminal nature. Motion denied.

 Aſſumpſit

Assumpsit upon a note of hand for 5l. 7s. by payee against drawer. Plea the general issue. This cause was tried at the last assises for Kent.—Plaintiff only proved the defendant's hand-writing.—Defendant, by two witnesses, proved the consideration to be smuggled goods: *yet* the jury found for the plaintiff.

Templin v. Vorsell. L. 28. G. III. B R. Verdict against law and evidence. Consideration of a note, smuggled goods. Yet jury found for plaintiff.

Morgan obtained a rule to shew cause why there should not be a new trial, without costs.

Serjeant *Bond* and *Adam* shewed cause.—The court made the rule absolute for a new trial, without costs.

To an action on a policy of insurance, tried before *Buller*, J. at the sittings at *Guildhall*, after last *Trinity* term, the defendant pleaded the general issue, and *paid money into court*. A verdict having been found for the plaintiffs, a new trial was moved for on the grounds that this was a verdict against evidence; and that upon the construction of the 25 *G. III. c.* 44. the plaintiffs could not support this action in point of law, the name of *Shultz* not being inserted in the policy. After argument, the court took time to consider of the case: and on this day,

Cox and another, Executors of Shultz, against Parry. M. [illegible] G. III. Durn and East, 1 V. [illegible]. Paying money into court is only an admission by the defendant that the plaintiff is entitled to recover the sum so paid: but it does not preclude him from taking any objection to the action beyond that sum; and unless such sum were paid, such objection would be a bar to the plaintiff's action. According to the 25 G. III c. 44. the name of the party interested must be inserted in a policy of insurance; otherwise he cannot recover upon it.

Ashurst, J.—delivered the opinion of the court.

This is an action on a policy of insurance, made in the name of *Lyon De Simons* on goods and jewels on board the *Halswell* from *London* to the *East-Indies*.

This policy was made on the 23d *December* last; which being long subsequent to the passing of the statute 25 *Geo. III.* the policy cannot by law be applied to any goods which were not the property of *De Simons*, or which he was not interested in (*a*) but the plaintiffs have endeavoured to make another use of it, and to apply it not only to the goods which were

(*a*) Vide Durnford and East. 1 V. [illegible] Pray and Edic.

ſhipped in the name of *De Simons*, but alſo to goods ſhipped in the name of *Shultz*. And in order to do that, they proved on the trial that *Shultz* ordered two policies to be made, one in the name of *Shultz* on goods and jewels for 1,400 l. the other (which is the policy in queſtion) in the name of *De Simons*, to the amount of 1,600 l. on goods and jewels; which policy was to be lodged in the hands of *De Simons*, as a ſecurity for 1,600 l. which *Shultz* had borrowed of him: When *Shultz* borrowed the money of *De Simons*, he aſſigned over to him the jewels which were ſhipped in the name of *De Simons*, and they were to be re-delivered to *Shultz* in the *Eaſt-Indies*, upon his paying the principal and intereſt there. The jewels ſhipped in the name of *Shultz* are totally loſt, but thoſe ſhipped in the name of *De Simons* have been recovered. If the plaintiffs can apply the policy to the goods ſhipped in the name of *Shultz* (as well as to thoſe ſhipped in the name of *De Simons*) there has been an average loſs, and the verdict which the plaintiffs have obtained ought to ſtand. If it cannot be ſo applied, the underwriters are liable only for the ſalvage of the jewels ſhipped in the name of *De Simons*; and, more having been paid into court, the verdict is wrong.

I have already ſtated, that by law the policy can only be applied to the intereſt of *De Simons*, the ſtatute having made it void to other purpoſes.—But a great queſtion in the caſe is, whether the defendant has not precluded himſelf from making that objection by paying money into court, therefore it will be neceſſary to ſee what effect paying money into court has in the cauſe.

It

It admits that the plaintiffs have a right to maintain the action (*a*) and reduces the question simply to the *quantum* of damages, which they are entitled to recover.

(*a*) Vide Elliott v. Callow. 2 Salk. 597.

In this case, if the defendant had not paid money into court, the plaintiffs must have been non-suited, for the executors of *Shultz* could not have recovered on a policy made in the name of *De Simons* only: but as the defendant has paid money into court, he has thereby admitted that the plaintiffs are entitled to maintain their action on the policy *to the amount of that sum*: but he has admitted nothing more. He does not, by paying money into court, vary the construction and import of the policy, so as to entitle the plaintiffs to recover beyond that extent.

The question still remains, whether upon this contract the plaintiffs are entitled to more. In order to ascertain that, it is incumbent on the court to examine and expound what the contract is. At the time it was made, it could only be good as an insurance on the goods which belonged to *De Simons*; it is made in his name; it is a good and valid contract, as far as it respects his goods; but is void as to all others. And the plaintiffs shall never be admitted to say that this contract, tho' apparently legal, is in fact illegal, as being made for their benefit; and yet they mean to avail themselves of that illegality, and to recover damages upon it.

Besides this, we think that, (independant of the objection in point of law), the verdict is not supported by any fact of the evidence. The broker's evidence does not by any means prove that *Shultz* did not intend to make

distinct policies upon the distinct goods shipped in his own name, and that of *De Simons*.

On the contrary, the making of two policies, each according to the value of the goods which were shipped in their respective names, and the purposes for which that was done, namely—to lodge one in the hands of *Shultz*, and the other in the hands of *De Simons*, and the impossibility that they should by law take effect in any other way than as specific policies on the specific goods (which we are bound to presume *Shultz* knew) are unanswerable proofs, that he intended that the policies should have the effects which the law gives them.

The defendant underwrote the policy made in the name of *Simons* only; and it does not appear that he knew or even heard of the other policy which was made in the name of *Shultz*. Then the evidence of one of the witnesses stands wholly uncontradicted, and he says that *De Simons* (who is one of the plaintiffs) told him that this policy was made on the particular jewels shipped in his name.

On the whole, we are of opinion, that this is a verdict both against law and against evidence; and therefore must be set aside.

Turner and others, v. Pearce. E. 27. G. III. B. R. Durnf. and East. 1 V. 717.

An objection to the competency of witnesses discovered after a trial, is not a sufficient ground of itself for granting a new trial: but it may have some weight with the court where the party applying appears to have merits.

This action was brought for withdrawing suit from the mill of the plaintiffs, situated within the manor of *Leeds*, which suit they claimed as lords of the said manor. The defendant, at the trial before Mr. Baron *Perryn*, at the last assises at *York*, set up an exemption as being situated within the manor of *Whitkerk cum membris*, which was part of the possessions of the knights of St. *John* of *Jerusalem*, the tenants of which manor had always been exempt from doing suit to the mill of the lord of the manor of *Leeds*. It appeared that the

manor

manor of *Whitkerk* extended into the manor of *Leeds*, and the defendant brought evidence to prove that the houses in respect of which this exemption was claimed were situated within that part of *Whitkerk*, and were distinguished by the mark of a cross. The jury found a verdict for the defendant; and a new trial was moved for, this term, upon two grounds; *first*, that it was a verdict against evidence. *Secondly*, upon an affidavit, that it had been discovered since the trial, that five out of nine of the witnesses on the part of the defendant, were interested in the event of the cause, and therefore were incompetent, and ought not to have been received. The ground of their incompetency was stated to be, that they contributed towards the relief of the poor of *Leeds*, and that the overseers of the poor had contributed twenty guineas, towards carrying on this suit in respect of the workhouse, which was one of the *St. John*'s houses, and claimed a similar exemption. In answer to this, an affidavit was made by those witnesses, that they did not know of this subscription at the time they gave their testimony.

Cockell Serjeant, *Wood* and *Topping*, shewed cause against the rule; and as to the second objection, they contended that it came too late, even if it were intitled to any consideration at all: for in strictness no person could be objected to as an incompetent witness, after he had been sworn in chief. In *Abrahams* and *Bunn*, (*a*) where a witness was not objected to 'till after his examination, Lord *Mansfield* said, "in strictness, the objection comes too late "after he has been sworn in chief, examined, "and cross-examined. The strictness of law, "in this respect, is very wise, and ought to "be

(*a*) 4 Burr. 2252.

" be adhered to, for the relaxation may be
" abused, and must always occasion a waste
" of time." But at all events, supposing the objection could be gone into, some of the most material witnesses did not know that the houses to which they belonged did contribute towards the general fund at the time that they gave their evidence: so that all objection, in point of interest, is entirely done away from them, and there were others who had no interest whatever.

Chambrè and *Law*, in support of the rule. If a witness has an interest in the cause, however small or remote, that will render him incompetent. Here the witnesses not only claimed a similar exemption in respect of the poor-house, but likewise contributed to the defence of this action. In the case of *Abrahams* and *Bunn*, Lord *Mansfield* was only stating what had been the ancient doctrine in respect to witnesses; and he certainly did not intend to recognize it in its fullest extent, for he says that it had been relaxed in modern times, and, in that instance too, he held the witness to be competent; therefore it was decided on another ground.

The counsel on each side also argued this case upon the merits; as to which, the court being of opinion, that the weight of evidence was in favour of the verdict, they also discharged the rule on that ground; but they first gave their opinions upon the other point.

Ashhurst, J.—The regular time for objecting to the competency of witnesses is at the trial. The ancient doctrine on this head was so strict, that if a witness were once examined in chief, he could not afterwards be objected to on the ground of interest. Perhaps that

that ſtrictneſs may in ſome degree be relaxed by the cuſtom of ſuffering witneſſes to be examined conditionally, which is only waving the objection for the time. But ſtill the objection muſt be made at the trial. Beſides the affidavit on the part of the plaintiffs is anſwered as to the bias which might be ſuppoſed to be on their minds, for they ſwear that they did not know of any ſubſcription at the time of giving their evidence.

Buller, J.—There has been no inſtance of this court's granting a new trial on an allegation that ſome of the witneſſes examined were intereſted; and I ſhould be very ſorry to make the firſt precedent.

Anciently, no doubt, the rule was, that if there was any objection to the competency of the witneſs, he ſhould be examined on the *voir dire*; and it was too late after he was ſworn in chief. In later times, that rule has been a little relaxed; but the reaſon of doing ſo muſt be remembered. It is not that the rule is done away, or that it lets in objections which would otherwiſe have been ſhut out. It has been done principally for the convenience of the court, and it is for the furtherance of juſtice. The examination of a witneſs, to diſcover whether he is intereſted or not, is frequently to the ſame effect as his examination in chief: ſo that it ſaves time, and is more convenient, to let him be ſworn in chief in the firſt inſtance; and in caſe it ſhould turn out that he is intereſted, it is then time enough to take the objection. But there never yet has been a caſe in which the party has been permitted *after trial* to avail himſelf of any objection, which was not made at the time of the examination; but in the preſent caſe there

is

is not the leaſt foundation for this court to interpoſe; for it cannot be ſaid, that the witneſſes were ſwayed by this intereſt in the leaſt degree. I do not ſay that it might not have been a ground to object to their teſtimony on the trial, ſuppoſing the whole of what was ſuggeſted by the plaintiff was true: but it would have been neceſſary to have determined another queſtion firſt; whether the houſes, in reſpect of which the witneſſes are ſuppoſed to be intereſted, were really houſes formerly belonging to the knights of *St. John* of *Jeruſalem*, before any deciſion could have been made on their competency; but at any rate we will not permit them to make the objection now. Where it appears that one or more material witneſſes who were examined on a trial were intereſted, it may afterwards weigh with the court as a circumſtance for granting a new trial, provided the merits of the caſe are doubtful; but as a ſubſtantive objection, I am clearly of opinion that it ought not to be allowed.

Grose, J.—As to the competency of the witneſſes, it is not contended that in point of law we are bound to reject their teſtimony now. This then is an application to our diſcretion; and the queſtion is, whether that ſhould induce us to reject their evidence after verdict. If this objection had been made before me at the trial, perhaps I might have admitted it: but then by the rule of law, objections of this nature muſt be made at the trial. And if the plaintiffs will inſiſt upon the ſtrict rule relative to the incompetency of witneſſes, the defendant has an equal right to avail himſelf of the rule that the objection now comes too late. Formerly the rule was to examine on the *voir dire*; that indeed has been relaxed: but

but this application requires us to go farther; and the affidavit ſtates no ſufficient grounds in ſupport of it.

In the firſt place, it does not clearly appear, that the plaintiffs did not know of the objection at the time of the trial. It is ſworn very looſely; and if they knew of it at that time, that would be a deciſive reaſon for refuſing to allow it now. However, although no new trial has ever been granted on ſuch an objection, I do not know but that, if a proper affidavit were made, it might have ſome influence on my mind, where the party applying has merits; but here the weight of the evidence is in favour of the verdict.

Rule diſcharged.

V. A Verdict against the Record, or against Law, but new Trial not granted against the Equity of the Cause.

Maby v. John Shepherd, extor. of Edmund Shepherd. T. 20. Jac. B. R. Cro. Jac. 640. Palm. 286. S.C. Godb. 283. S.C. Debt upon obligation by Edmund S. Oyer. Bond subscribed Edmund, the true name, but it was Edward in the obligation, non est factum testatoris. Jury found it the deed of Edmund.

Debt upon an obligation for 40 l. by *Edmund Shepherd:* the defendant demanded oyer of the deed, and of the condition, which was entered *in hæc verba; noverint universi pro præsentes me* EDWARDUM *teneri, &c.* in 40 l. And he subscribed it by the name of *Edmund Shepherd*, which was his true name; the defendant pleaded *non est factum testatoris.* The jury found that it was the deed of the said *Edmund Shepherd* the testator. And now it was moved, that notwithstanding the verdict is found for the plaintiff, yet the judgment ought to be given against the plaintiff: for he declares upon a bond by *Edmund Shepherd*, and shews a bond of *Edward Shepherd*, which is another person; and they never were the same, but distinct names. And although it be subscribed by the name of *Edmund*, yet it is no part of the bond; which being apparent to the court, the plaintiff cannot have judgment, but ought to be barred; and of that opinion was the whole court. And although the jury hath found it to be the deed of the said *Edmund*, yet that will not help it, but he ought to have brought his action according to the bond: wherefore it

it was adjudged, *quod quæreus nihil capiat per billam.* Vide *Dyer* 279. *Shoibolt*'s case, and *Watkins* and *Oliver ab Colver Cro. Jac.* 558.

Judgment quod quærcus nil capiat, &c.

In ejectment, the plaintiff was a mortgagee, and claimed by surrender, whereas the land was not copyhold, and defendant claimed only by a voluntary conveyance. The verdict was for the plaintiff, and the court could not set it aside, and grant a new trial, against the honesty of the cause.

Smith v. Page, M. 8. W. III. B. R. Salk. 644. No new trial against the equity of the cause.

Upon *non assumpsit* pleaded, the jury found for the plaintiff, tho' the dutchess gave good evidence of her coverture; and the court would not grant a new trial, because there was no reason why the dutchess, who lived here as a *feme sole*, should set up coverture to avoid the payment of her just debts.

Derrly v. the Dutchess of Mazarine. Hill. 8. Will. III. B. R. Salk. 646. New trial not granted, for mistake in point of law, against the honesty and equity of the cause. Vide ante.

TRESPASS *quare clausum fregit.* The defendant pleaded, 1st. Not guilty. 2dly, He prescribed for a certain way, leading from a *common highway* in *Birkin*, into, through, and over the plaintiff's closes, in which, *&c.* The plaintiff by his replication traversed the prescription, whereupon issue was joined. At the trial of this cause, the council for the defendant, having admitted the trespass, called ten witnesses, who clearly proved the defendant's right of way. But it appeared upon the evidence that this *way* did not lead from a *common highway*, but did lead from a certain *private way* in *Birkin*; whereupon it was objected at the trial, that the defendant had not proved his prescription to the way, it being laid in his plea that the *terminus a quo* was from a *common highway*, whereas the proof was, that it was from a *private way*; but the right to the way over the plaintiff's closes, in which, *&c.* being clearly proved, Mr. Justice *Gould*, before whom the cause

Sampson, v. Appleyard. M. 12. G. III. C. B. 3 Wils. 272. In trespass defendant prescribes for a way over the close, in which, &c. and mistakes the terminus a quo, in his plea: verdict for the defendant. The court refused to grant a new trial, the merits having been tried.

caufe was tried, left it to the jury (nine of which jury had a view) who found a verdict for the defendant for his right of way.

And now Serjeant *Leigh* for the plaintiff moved for a new trial, objecting that the defendant had failed in proving the prefcription, as laid in his plea; that the *termini à quo*, and *ad quem* over what land ought to be laid, and proved with the utmoft certainty. That here the *terminus à quo* was laid to be a *common highway*, but was proved to be a *private way*; and he cited *Lit. Rep.* 295.

Serjeant *Burland* for the defendant.—The merits of this cafe have been tried, and the courts do not grant new trials for any little flip in pleadings, where they fee that the merits have been tried; but I fubmit it to the court, that the *terminus à quo* is not a material part of the *prefcription*; the defendant is called upon in this action to fhew his right of way over the place in which, &c. he pleads that he has *that* right by *prefcription*; the material part of which *prefcription* is confined to the *locus in quo*. The plaintiff could not have replied that the *terminus à quo* was from a *private way*, *abfque hoc*, that it was from a *common highway*, becaufe the merits could not have been tried upon an iffue taken on *that traverfe*.

Palmer 420.

Lord Chief Juftice *De Grey*.—This is a motion for a new trial, becaufe the defendant, in his plea, has miftaken one abuttal of the *way*; if a new trial was to be granted, the defendant would amend his plea, according to the evidence, and would have another verdict, in all human probability, having given fuch clear proof of his right by many witneffes.

Upon

Upon this record, it is certain that the defendant was bound to prove his right of way as it is pleaded; he has proved it to a common intent; the *terminus à quo* is pleaded to be a *common highway*, (it is not described to be the king's highway,) and a *common highway* may be a *private way* in common ſenſe and underſtanding; however, the merits have been tried, and therefore a new trial ought not to be granted.

Nares Juſtice.—I am of the ſame opinion; and the court never grants a new trial, when they clearly ſee the merits have been fairly and fully tried.

Gould Juſtice.—I am of the ſame opinion; and that in pleading a right of *way*, you need not deſcribe the *terminus à quo*, becauſe the plaintiff may reply *extra viam*, which will be a matter for evidence.

New trial refuſed *per totam curiam*.

Edie and another v. Eaſt-India Company. T. 1 G. III. B. R. 2 Burr. 1216. Verdict for the plaintiff on one count, right; for the defendant on the ſecond, wrong; evidence of uſage contrary to ſettled law having been admitted, new trial granted, but verdict ſet aſide generally.

This was an action, brought by the indorſees, upon *two foreign bills of exchange*, drawn by colonel *Clive*, then in the *Eaſt-Indies*, upon the *Eaſt-India* company, and accepted by them, payable to Mr. *Campbell* or order, then alſo in *India*, and indorſed by Mr. *Campbell* to Mr. *Robert Ogilby*. One of theſe bills was by ſuch indorſement directed to be paid to *Robert Ogilby or order*, in the uſual way of indorſing; and no diſpute or queſtion aroſe upon it. The other bill was alſo indorſed by Mr. *Campbell* to *Robert Ogilby*; but the words, " *or order*," were originally OMITTED in *this indorſement*, and afterwards put in, by another hand, before the trial.

Theſe bills, *thus* indorſed by Mr. *Campbell* to Mr. *Ogilby* (without adding the words *or order* in the indorſement of the latter) were

by him indorſed to the plaintiffs *Edie* and *Lard*, or order.

Ogilby became inſolvent; and the queſtion then was, Who was to *bear the loſs*; whether Mr. *Campbell*, or the plaintiffs? (for the *Eaſt-India* company were no more than ſtake-holders.)

The diſpute aroſe only upon this latter bill: for the firſt bill was given up at the trial, by the counſel for the defendants; and a verdict was taken for the plaintiff upon *that* count. But

On the ſecond, an objection was taken to the *want* of the words "*or order*;" which the defendant's counſel inſiſted were neceſſary to be *originally* inſerted by the indorſer; and that the OMISSION of them was equivalent to the moſt *reſtrictive* words that he could have made uſe of in order to limit the payment. And accordingly, on this ſecond count, a verdict was found for the defendants.

Mr. *Morton*, of counſel for the plaintiffs, having moved for a new trial, Mr. *Norton* and Mr. *Wedderburn* now ſhewed cauſe, on behalf of the defendants, why a new trial ſhould not be granted.

In ſupport of the motion, Mr. *Morton* and Mr. *Yates* had cited the three following caſes, *viz.* * *More* v. *Manning*, *Comyns* 311. in point: where it was holden, "That a promiſſory note "to pay one or order, is aſſignable *toties* "*quoties* by the indorſee or indorſees, though "the words *or order* be omitted in the in-"dorſement."

* In C. B. Hil. 6 G. I.

† *Acheſon* v. *Fountain*, 1 *Strange* 557. in point alſo; it being there holden, "That an "indorſable note indorſed to *A. B. without* "ſaying *or order*, is an indorſement to the in-"dorſee or order: for the *law* interprets the "aſſign-

† In B. R. Trin. 1723. Vide Eff. I. [A.] II. (11.) [4.] (a.)

" assignments to be in the *same* manner as the " note is drawn."

And *Evans* v. *Cramlington*, in *Carthew* 5. and 2 *Ventris* 309, 310. which was said to be applicable to the present case.

They alledged, that every indorsement imports that the *value has been received* by the indorser: and

A promissory note or bill of exchange, originally made payable to one or order, is *in its own nature assignable*; and the assignee has the *whole interest* in it, and may assign it as he pleases; and any *restriction or confinement* of his assignment of it is *contrary to the nature of the thing*, and therefore void.

An indorsement is an assignment, and, for the reasons aforesaid, is not restrainable by the omission of words, or even by negative words; and if it be given in blank, it may be filled up by the indorsee or by any one else, even in the face of the court, *at the trial* *.

* See Comyns 312. accord.

Having thus established this principle, " That the bill of exchange being *originally* " *made assignable and negotiable*, and being *in* " *its own nature assignable*, must continue *al-* " *ways so*; and that the law will interpret the " assignment to be made in the *same* manner " in which the bill is drawn, although the " words *or order* be *omitted*."

They grounded their motion for a new trial upon these two foundations:

1st, That the jury have found directly contrary to this settled law, and have founded their verdict upon the CUSTOM OF MERCHANTS, which they suppose to be quite to the contrary; and of which custom of merchants *evidence* was permitted to be given at the trial: which *evidence* should not have been

 allowed.

allowed. For the cuſtom of merchants is part of the law of *England*; and the law of *England* being already fully ſettled on this point, no evidence in contradiction to it ought to have been *admitted*; nor can any finding of a jury *alter* it.

2dly, That *if* the counſel for the plaintiff had *apprehended* that ſuch ſort of evidence would have been gone into at the trial, they could and would have produced better and fuller evidence than they did, to prove that the cuſtom of merchants was really and in truth and fact *agreeable* to the law as ſettled: and they alledged that *no fact* of uſage was proved at the trial, to ſupport a notion, that the acceptor was not liable upon ſuch an indorſement as this.

Mr. *Norton* and Mr. *Wedderburn*, *contra* for the defendants, inſiſted that the preſent verdict was right, and ought to ſtand. It has been urged, 1ſt, "That this bill is *in* "*its nature negotiable*;" and 2dly, "That "being ſo, it cannot be *reſtrained* by this or "any other indorſement."

As to the firſt:—They agreed a bill of exchange to be negotiable in its *nature*; but it does not follow, they ſaid, that becauſe it was *once* ſo, it muſt therefore *always continue ſo*: for the payee has the *abſolute* property in it; he is the purchaſer of it: and why ſhould not he *limit* the payment of it as he pleaſes? No man can be *injured* by this; no man can be *deceived* by it; it cannot be attended with the leaſt inconvenience.

No caſe can be cited to the contrary. The caſes that have been cited do not apply to it; as will appear preſently.

4 An

An *imperfect* indorſement, an indorſement in blank, indeed may be ſupplied: but the owner *may*, if he thinks proper, indorſe it *negatively* and *upon terms*; and then the indorſee *takes* it upon thoſe terms, and *under* that reſtriction, which the indorſer has expreſsly impoſed upon it.

This is no more than a naked authority to receive the money.

It is not true, "That *every* indorſement *imports* value received by the indorſer. For an indorſement may be ſo worded as to ſhew that the intereſt *remains* in the indorſer: as for inſtance, "Pay this bill *to my ſteward*, and *to no other* perſon;" or, "Pay to ſuch a one *for my uſe*, and to no other perſon whatſoever."

And whether he has or has not ſo limited it, is a queſtion of *fact*, not of law: and it depends upon the *cuſtom of merchants*.

The caſe of *More* v. *Manning* does not contradict our principle: it does not appear that that was not an indorſement in blank; which, it is agreed, does not deſtroy its negotiability. The aſſignment was there treated as an abſolute aſſignment to *Witherhead*: it muſt have been an indorſement in blank; and the caſe goes upon that ſuppoſition: however, that came before the court upon demurrer.

The caſe of *Acheſon* v. *Fountain* was only a queſtion, "Whether the plaintiff's evidence "*ſupported her declaration*:" but her demand was full and clear, *without* thoſe words. The caſe could not require the reaſons there given: therefore they are at beſt extrajudicial, or perhaps added by the * reporter.

* The court expreſſed themſelves to the effect there reported. Sir James Burrow's note of that caſe agrees with Sir John Strange's.

 As

As to *Evans* v. *Cramlington*—'Tis nothing like this caſe; nor is any inference to be drawn from it.

Beſides, all theſe caſes are only upon *promiſſory notes*, which depend upon our municipal laws: and promiſſory notes are, by the ſtat. of 3 and 4 *Ann. c.* 9. put upon the ſame foot with *inland* bills of exchange.

But *foreign* bills of exchange ſtand upon quite another foot; † namely, upon the general law and cuſtom of merchants. And the verdict ſuppoſes and proves the cuſtom of merchants to be with the defendants: and the evidence of ſeveral eminent merchants and experienced perſons at the trial, was agreeable to the finding. And if they *could* have encountered it, why did they not? Their omitting to do ſo, is ſurely no ground for a new trial.

† Wood's Inſt. 283.

Mr. *Morton* and Mr. *Yates* in reply.—They admit the queſtion to be, "What is the true "conſtruction of ſuch a reſtrained indorſe- "ment as this is?" And certainly this ſort of indorſement makes, or rather continues, a bill of exchange generally negotiable. Meſſieurs *Edie* and *Laird* are in the caſe of every common indorſee.

The caſes that we have cited are plain and clear on our ſide: on the other ſide, they ſuppoſe imaginary circumſtances, which did not really exiſt in them.

The determinations upon promiſſory notes, prove "that the law was likewiſe ſo upon fo- "reign bills of exchange."

The *fact* of uſage, that would have been cogent and binding, if proved, ſhould have been a *refuſal* to negotiate a bill with ſuch a limited and reſtrained indorſement.

If

If this bill was to go back to *India*, protested by Messieurs *Edie* and *Lard* for non-payment by the company and the indorsers, undoubtedly the drawer would be liable to Mr. *Edie* and Mr. *Lard*, for the payment of it.

Lord MANSFIELD.—I thought, at the trial, that the defendants *might* be at liberty to go into the *usage of merchants* upon this occasion. And Mr. *Race*, the cashier of the Bank of *England*, gave evidence, " That the Bank, if " ever they discounted these bills not indorsed " to order, did it *only* upon the *credit of the* " *indorser*; but that otherwise they would not " take them. *not* considering them as being " negotiable."

Mr. *Simon*, a very eminent and experienced merchant, deposed, That he considered the omission of these words as *restrictive* of the indorsement to the particular individual person specified in the indorsement: and he added, that it was, in his opinion, merely in the nature of a *personal authority*, " to receive the " money;" and was not negotiable.

So Mr. *Grant*, another witness on the part of the defendants, declared his opinion also to be.

So also Mr. *Regnier*, their fourth and last witness. These were the four witnesses for the defendants.

The plaintiffs, on their part, called Mr. *Richard Cope*, partner with Mr. *Honeywood* the banker: but they were mistaken in him; for he agreed with the other four witnesses exactly.

Another witness called by the plaintiffs was Mr. *Udney*: who thought it sufficient without the words " or order," and attested that he

had himſelf *diſcounted* one, and ſaid he had *paid*, he believed, fifty bills, where the words "or order," were omitted in the indorſement.

Mr. *Macbean*, a notary public, alſo in his opinion held the indorſement of a bill of exchange to be negotiable, notwithſtanding the omiſſion of theſe words: and that no objection of this ſort was ever made. Indeed if the bill ſhould be indorſed, "Pay the contents to *A.* "*B.* only," it was looked upon, he ſaid, to be a reſtriction of the payment to *A. B.* perſonally.

Mr. *Uny* and Mr. *Anderſon* depoſed to the ſame effect, "that the omiſſion of the words "*or order*, did not prevent the negotiability."

But the plaintiffs did not, however, come prepared with *particular* witneſſes to the *uſage* in ſuch caſes; not expecting that the evidence in ſupport of ſuch an uſage, would have been admitted.

I told the jury, that by the *general* law, (laying the *uſage* out of the caſe,) the indorſement would *follow the nature of the original bill*, and be an *abſolute* aſſignment to the indorſee or his order.

And after having told them that this was the *general* law, then I left it to them upon the *particular* evidence of the USAGE, that had been laid before them; and recommended it to them to conſider well of this evidence; and told them, that if they found an USAGE, ſo *eſtabliſhed and ſettled* amongſt merchants and traders as to be *clear* and *plain*, and *beyond doubt*, they might find a verdict for the defendant upon that ſecond bill: but I directed them, that if they were *doubtful of the uſage*, or if the uſage appeared to them *not to be fully*

and *clearly established*, or to be the *other* way, then they ought to find for the plaintiffs.

I told them, that the question arose upon the insolvency of *Ogilby*, the first indorsee; and that it ought to be considered by them, *who* it was that *gave the trust to Ogilby*: for he that gives the trust, ought to run the risque of his credit.

I observed, that this indorsement was made by Mr. *Campbell*, the payee, to this *Ogilby*; and if *he* meant to trust *Ogilby*, it was but reasonable that he should be the person to suffer by *Ogilby*. And it was clear that he meant to trust *Ogilby* with the money: for it is acknowledged on all hands, that *Ogilby* himself had a right to receive it of the company, whether he had a right to indorse the bill to another person or not.

The jury staid out a considerable time, and then brought in a verdict for the plaintiffs, upon the bill indorsed to *Ogilby or order*, (which was not disputed:) but they gave their verdict for the *defendants*, upon that count which declared upon the second bill (for 2000 l.) which was indorsed to him WITHOUT adding the words " *or order*."

In the whole course of the evidence, *no one fact* was proved, where the indorsee to whom a bill was indorsed, without adding the words, " or order," *ever actually* LOST *the money*, so as to put him upon *disputing* the point.

Since the trial I have looked into the cases, and have considered the thing with a great deal of care and attention, and thought much about it: and I am very clearly of opinion, that *I ought not* to have admitted any evidence of the particular *usage* of merchants in such a

case.

case. Of this, I say, I am now satisfied; for the *law* is already SETTLED.

I lay the case of *Evans* v. *Cramlington* out of the way, as I do not see that it is much applicable to the case now before us.

But I go upon the two cases of *More* v. *Manning*, and *Acheson* v. *Fountain*. The former was an *assumpsit* upon a promissory note, given by *Manning* to *Statham* or order. *Statham* assigned it to *Witherhead*; and *Witherhead* to the plaintiff. Upon a demurrer to the declaration, exception was taken, "because the "assignment was made to *Witherhead without* "saying to him *and order*; and then he *can-* "*not assign it over.*" But it was resolved by the whole court, that it was *good*: for *if* the the *original* bill was assignable, then, to whomsoever it is assigned, he has *all* the interest in the bill, and may assign it as he pleases. And very right that was: for the main foundation is, "what the bill is in it's *original*?" And accordingly, as that note was *originally* made payable to *Statham and order*, they held the assignment of it to *Witherhead* to be an *absolute* assignment to him, which comprehended his assigns. It *could not be* an indorsement in *blank*; because it is stated, "that the assign- "ment was made to *Witherhead*, without say- "ing to him or order." The point resolved was, that the assignment *to Witherhead* was *absolute*. The words added at the end of the report are inaccurate, and might, at first view, occasion a little confusion: but, to be sure, the court went into an additional argument, which the reporter has omitted to particularise. But the declaration *sets out* the assignment; which is "an assignment by *Statham to Wither-* "*head*, omitting to add the words *and order*."

 Then

Then as to the other case of *Acheson* v. *Fountain*. —The plaintiff had declared upon an indorsement made by *William Abercrombie*, whereby he appointed the payment to be " to *Louisa* " *Acheson or order*:" upon producing the bill in evidence, which appeared to be originally made payable to *Abercrombie or order*, yet *Abercrombie*'s indorsement was only this— " Pray pay the contents to *Louisa Acheson*." It was objected, " that the indorsement did " *not agree* with the declaration." The court, notwithstanding this, gave judgment upon the ground of a *general proposition* in law, " That " a bill is negotiable, *without* adding those " words to the indorsement." And though the plaintiff *might*, perhaps, have had leave to amend his declaration in the point objected to, yet the declaration came before the court *unamended*: so that the objection came with it's full strength; and the court gave their opinion upon the point, as a matter of *clear settled law*: for the whole court were of opinion, " that it was well enough, *that* being " the *legal import* of the indorsement; and " that the plaintiff *might*, *upon this*, *have indorsed it over to another*, who would be the " *proper order* of the *first* indorser. And accordingly, judgment was given for the " plaintiff."

A draft drawn upon one person, directing him " to pay money to another, *or* " *order*;" is, in it's *original creation*, *not an authority*, but a *bill of exchange*, and is negotiable. It belongs to the payee to do what he thinks proper with it, and to use it as best suits his convenience. It is his *property*; and he may assign it *as such*, and to whom he pleases: and his direction " to pay it *to such a* " *one*,"

" *one*," *is a* direction " to pay it to him *or his* " *order*;" for he assigns his *whole* property in it, and has had a *valuable consideration* for so doing.

Another thing observable is the absurdity of the opinion of the merchants, (which they avowed to be their opinion,) " that a bill " thus indorsed was *not* to go to the executors " or administrators, in case of the indorsee's " death :" whereas there can be no doubt, that such an interest is *transmissible* to executors or administrators.

The words " *or order*" are not necessary to be *inserted in the indorsement*, any more than the words " *executors or administrators*," are necessary to be added to it.

The point now in question has been already *solemnly settled* both in the court of king's-bench and common-pleas, by the two adjudications that have been mentioned: and therefore witnesses ought *not* to have been examined to the *usage*, after such solemn determinations of what was the law.

Therefore there ought to be a new trial.

As to the costs—I think there should be none, in this case. For the verdict must be set aside *generally*, not in part only. Yet this verdict is agreed to be right upon the *first* count; and that is found for the *plaintiffs*; therefore there ought to be no costs upon granting a new trial in the present case: since the merits were *always* clear for the plaintiffs, on the *first* count; and it *now* appears that nothing remained to be tried, on the *second*.

Mr. Just. *Denison* concurred *in toto*.

This verdict upon the second count is not well founded. The point in question is not matter of *fact*; but matter of *law*.

I never

I never before heard of this notion of a *restrictive* assignment of a *negotiable* bill.

Where a bill is originally made payable to *A.* or order, it is of course and in its very essence negotiable from hand to hand. An inland bill of exchange is assignable in its nature *toties quoties:* and promissory notes are now put upon the same foot with them. Foreign bills of exchange are equally so, by the law of merchants, and by the settled determinations of courts of law in *England.*

This is a matter of *law:* and the law is clearly and fully fixed. There is no instance of a *restrictive limitation*, where a bill is *originally* made payable to a man *or order.*

I never heard of an indorsement to *A. only.* In general, the indorsement follows the nature of the thing indorsed; and is equally negotiable.

But at least, *here* is no such restraint as *that:* here is nothing from whence to collect an *intent* to limit and restrain it. The law has determined that the bill is negotiable in itself: and there is no law to the contrary, nor any pretence for it in the present case. And it would be infinitely inconvenient, if it should be otherwise; for as no circumstances at all appear, it would destroy or disturb that *certainty* which transactions of this nature require.

An *executor* or *administrator* may indorse a bill or promissory note, within the custom of merchants. In the case of *Rawlinson* v. *Stone*, *M. 20. G. II. B. R.* upon a writ of error from *C. B.* an inland * bill of exchange was made payable to *A.* or order: *A.* died, and the administrator of *A.* assigned the note to the plaintiff in the common-pleas, for whom that court gave judgment upon demurrer. The court upon argument of the writ of error here,

* 2 Stra. 1260. Robinson v. Stone.

here, held, " that the *executor or administrator* " *might* assign it over :" and they affirmed the judgment of the court of common-pleas. The executor or administrator is only assignee in *law*, not in fact : yet they held that he might assign it by the *name* of executor or administrator ; and that it was the common method to do so, the indorsement virtually included it.

Now the present case includes that, and more : for here, the first indorsee was an assignee in *fact*. And it ought to be so, for the sake of certainty, and for the benefit and convenience of trade. No intention appears here to restrain it : and in general, the *law* says it is assignable.

And it is not material when or how filled up : for it is every day's practice to fill up the indorsement long after it is made ; nay even in court, at the trial.

I will not give any opinion whether the indorser MIGHT have limited his assignment by some clear plain negative words, if in fact it had been his intention to limit and restrain it.

But no such intention appears : the indorsement is *general* ; and the law is settled, " that " the assignment follows the nature of the " thing assigned."

And the law being already so settled, the jury ought not to have given their verdict upon an opinion contrary to it.

A new trial ought therefore to be granted : but no costs should be paid : for the reasons already mentioned.

Mr. Justice *Foster* concurred that there should be a new trial ; because it is a verdict against a known and settled rule of law ; as appears by the two adjudged cases reported in

Comyns

Comyns and *Strange*. Therefore it ought not to have been left to a jury at all.

Much has been said about the *custom of merchants*: but the *custom of merchants*, or law of merchants, is the law of the kingdom, and is *part of the common law*.

People do not sufficiently distinguish between customs of different sorts, the true distinction is between *general* customs (which are *part* of the common law) and *local* customs, (which are not so.) This custom of merchants is the *general law* of the kingdom, part of the common law; and therefore *ought not* to have been left to the jury, *after* it has been already settled by judicial determinations.

But there should be *no costs* paid upon this occasion; because the verdict is both against law and against the opinion and direction of my lord chief justice, upon the second count; and is with the plaintiffs, on the first.

Mr. Just. *Wilmot* was of the same opinion.

The *law* with regard to this point, is *settled* and fully *established* by the two cases which have been cited; and upon right and proper principles.

This original contract is, "to pay to such "person or persons, as the payee or his assignees "or their assignees shall direct:" and there is as much privity between the last indorser and the last assignee, as between the drawer and the first payee. When the payee assigns it over, he does it by the law of merchants; being a chose in action, not assignable by the general law. And the indorsement is *part* of the original contract, and is *incidental and appurtenant* to it in the nature of it; and must be understood and interpreted to be made in the *same manner* as the bill was drawn. And the indorsee holds it in the

the ſame manner, and with the ſame privileges, qualities, and advantages, as the original payee held it; that is, as an aſſignable negotiable note, which he may indorſe over to another, and that other to a third, and ſo on at pleaſure.

There is a great deal of difference between giving a naked authority "to receive it," and transferring it over *by indorſement*. And I doubt whether he *can* limit his indorſement of it by way of aſſignment or transfer to another, ſo as to *preclude* his aſſignee from aſſigning it over as a thing negotiable. For the aſſignee purchaſes it for a *valuable conſideration*; and therefore purchaſes it with all its privileges, qualities, and advantages; one of which is, it's negotiability.

To be ſure, he *may give* a mere *naked authority* to a perſon "to receive it *for him*;" he may write upon it—"pray pay the money to "my ſervant for my uſe;" or uſe ſuch expreſſions as neceſſarily import that he does *not mean* to indorſe it *over*, but is only authoriſing a particular perſon to receive it *for him* and for his *own uſe*. In ſuch caſe, it would be clear that *no* valuable conſideration had been paid him. But at leaſt, that intention muſt *appear upon the face of the indorſement*. Whereas here, *no* ſuch thing nor any thing tending to it, appears upon the face of the indorſement: it is a *general aſſignment* without any reſtriction at all.

The principle I rely upon, is the *paying a valuable conſideration* for the aſſignment.

In the caſe of *More* v. *Manning*, (*which is in point*,) theſe words added at the end, * "that at a trial, when a bill is given in evi-"dence, the party may fill up the blank as "he pleaſes,"—are redundancy. And that indorſement

* Vide Comyns, 312.

indorsement could not be an indorsement in *blank*: it appears otherwise from the case itself. It was made *to Witherhead*, but without saying to "him and order."

So the other case reported in 1 *Strange*, 557. is likewise in point. And there is no difference, whether the determinations be on promissory notes or on bills of exchange; it is just the same thing; because it is to be governed by the same rule.

[He cited a manuscript report of the case of *Acheson* v. *Fountain*, which is reported by Sir *John Strange*: which agreed with Sir *John's* report of it.]

There is another case in *Carthew*, 403. *Fisher* v. *Pomfrett*, that shews this to be a right determination; (though the state of that case was indeed just the reverse of the present case.) It was a bill of exchange, payable to *T. S.* who indorsed it, "pay the contents of this "bill unto the order of Mr. *Fisher*." *Fisher* brought his action *as indorsee*. The defendant demurred to the declaration, because the indorsement was not to *Fisher* himself, but to *his order*; but the court held that *Fisher* might well bring the action: "for, amongst trades-"men, that form was commonly used, though "intended to be made payable to the *person* "*whose order is mentioned*." And *Fisher* had judgment.

Therefore a note indorsed over to *A.* would enable him to indorse it over to *B.* and so on. For the *convenience and course of trade* is to be attended to: the *intention* is to be regarded, not the form.

The *custom of merchants* is *part* of *the law of England*: and courts of law must take notice of it as such.

There may indeed be *some* queſtions depending upon cuſtoms amongſt merchants, where, *if* there be a DOUBT *about the cuſtom*, it may be fit and proper to take the opinion of merchants thereupon: yet that is only where the *law* remains *doubtful*. And even there, the cuſtom muſt be proved by *facts*, not by OPINION only: and it alſo muſt be ſubject to the controll of law. And ſo was the caſe of *Hawkins* v. *Cardy*, reported in *Carthew*, 466. and in 1 *Salk*. 65. There the defendant had given a note under his hand, "to pay "unto *E. G.* or order a certain ſum of money: "*E. G.* by indorſement on this note, ordered "PART of *the money* to be paid to the plaintiff. "Upon which this action was brought: "and a ſpecial *cuſtom* amongſt merchants was "laid in the declaration, according to the "plaintiff's caſe." Upon a demurrer to this declaration, it was adjudged, "that this is a "*void* cuſtom; becauſe by means of ſuch "diviſion, the defendant would be ſubject to "as many actions, as the perſon to whom the "note was given ſhould think fit; and this "upon a *ſingle contract*, which ſubjected him to "one action only." This warrants what I ſaid, "That the *original contract* muſt be looked into." Here the original contract is a *negotiable* bill; and the indorſee is in the *place* of the original payee.

The two caſes of *More* v. *Manning*, and *Acheſon* v. *Fountain*, ſerve to prove "that there "is NO *ſuch cuſtom of merchants* as the defen-"dants pretend:" for they could not have been ſo determined as they were, if there *had* been ſuch a cuſtom of merchants.

Therefore theſe *judicial* determinations of the point are the LEX MERCATORIA, as to *this* queſtion: for they ſettle what *is* the cuſtom of

of merchants; which custom is the *lex mercatoria*, which is part of the law of the land: but this finding of the jury in the present case, is directly contrary to the *lex mercatoria* so fully settled and established by legal adjudications.

Therefore the verdict ought to be set aside: but it should be without costs; for the reasons already specified.

Per. Cur. unanimously,

The verdict was set aside, and a new trial ordered; (but without costs.)

This was action of trespass *vi et armis*, for taking five boys, apprentices to the plaintiff, out of the hands of the plaintiff.

Lord MANSFIELD, who tried the cause, reported the evidence.

These were apprentices regularly bound to *Reavely*, for the sea service. The action was trespass *vi et armis*, for taking them.

It was proved, on the part of the plaintiff, that they were voluntarily indentured to him, and were by his direction delivered to one *Jones*, to be kept by him, to prevent their running away. Part of *Jones's house* was a prison, part a public house.

The justices, at their session of gaol delivery, upon a complaint of "an intention to sell "them in *Guinea*," discharged them.

Reavely ordered them to be put into the hands of *Jones*. *Walker* sent a note to *Jones*, to deliver them to the lieutenant of a tender of a man of war: who thereupon delivered them, and took a receipt for them.

This was the evidence for the plaintiff.

On the part of the defendants, it appeared that one *Lane* told *Walker* of the boys complaints, and of the affecting scene that he had seen.

Reavely v. Mainwaring, esq; Walker, et al. H. 2. G. III. B. R. 3. Burr. 1306.

Trespass for taking five boys, apprentices to the plaintiff, out of his hands. Apprentices discharged by justices at sessions, on complaint of an intention to sell them in Guinea. They had been put by plaintiff into the hands of Jones, to be kept safely: Walker sent a note to Jones to deliver them to the lieut. of a tender of a man of war. They were accordingly delivered. Walker, who was lieut. of a man of war, had, upon the boys being discharged, obtained their consent to serve the king, and had given Jones a guinea to take care of them 'till he

he ſent for them, &c.
Verdict for all the defendants Motion for new trial. Qu. if treſpaſs *vi et armis*, will lie in this caſe. Walker ought to have been found guilty, becauſe he ſent a preſs-garg for them. But as it was an hard action againſt him, new trial refuſed. No colour for the action againſt the other defendants.

One of the boys alſo gave evidence of *Blackwood*'s picking them up; and of their being deceived, and ill uſed at *Jones*'s, and their endeavours to eſcape. That *Walker* and *Pell* came to the priſon: and the boys made their complaints to them. Upon which they were ſent for to the court-houſe: and they all made their complaints to the juſtices, of their being deceived, impriſoned, ill uſed, &c. and their apprehenſions of being ſold.

The plaintiff next morning ſent coaches to carry them away. They reſiſted. *Walker* (who was lieutenant of a man of war) being preſent, aſked them if they were willing to ſerve the king. They aſſented. He ſent a preſs-gang. They went with their own conſent. They begged of the juſtices to be ſet at liberty. They were brought into court before the juſtices as priſoners; but no commitment being produced, the juſtices diſcharged all and each of them, by writing againſt their names—"diſcharged."

Walker bid *Jones* to keep them *that night*. But there was no order to deliver them to *Walker*: they were only diſcharged from being kept as priſoners. Whereupon *Walker* aſked if they were willing to ſerve the king: to which they aſſented. And *Walker* gave *Jones* a guinea to take care of them that night.

At the trial, all the defendants were found "*not* guilty;" as well the juſtices, as the lieutenant.

Mr. *Yates* now ſhewed cauſe againſt a new trial, which had been prayed by the plaintiff.

He inſiſted, that as the boys were in the hands of *Jones*, who he ſaid, was agent to the plaintiff, and *delivered* them to the lieutenant who commanded the preſs-gang, upon a note from *Walker*, and *took a receipt* for them from him,

him, here was *no force*; therefore trespass *vi et armis* will not lie. It ought to have been an action upon the case, or an action upon the statute of labourers: for which, he cited *Bro. Abr.* title *Labourer* 21, 28. as in point. 6 *Mod.* 182. *Queen* v. *Daniel*, (the second resolution) is in point also, "that a *common* "action of trespass will *not lie*, for inticing "an apprentice or servant from his master, if "there be no *force*."

And here, *Jones*'s delivery was the delivery of the *plaintiff*; he was the *owner's agent*.

Mr. Solicitor-General, and Mr. *Morton*, on behalf of the plaintiff, did not dispute the *law*, but the *fact*.

The *justices* discharged the boys: they were put into the hands of *Jones*, *by the justices*. *Walker* ordered them out of *Jones*'s hands into the hands of the lieutenant, who headed the press-gang.

Here was *no seduction* or *inticement*; but a forcible taking away a man's apprentices by a *press-gang*, and carrying them on board a man of war: in which *Walker* was concerned, as having actually sent the press-gang to fetch them. And in trespass, *all* are *principals*.

Lord MANSFIELD.—It was objected, at the trial, that *Walker* could not be liable to an action of trespass *vi et armis*: for that *Jones* delivered them *voluntarily* to the lieutenant.

But I thought then, and now think that he *was* liable to this action; because he sent a *force*, a press-gang, to take them.

As to the justices,—there was no colour to maintain the action against them.

A special jury of gentlemen found all the defendants not guilty.

 I think

I think they *ought* to have found *Walker guilty*, upon the evidence that was laid before them. Yet it would have been very hard, if *Walker* had suffered for his behaviour upon this occasion; because he seems to have acted with good intentions.

Therefore I think that there ought *not* to be a new trial.

Rule to shew cause "why there should not "be a new trial."—Discharged.

Earl of March v. Pigot. Trin. Tm. 11 G. III. in B. R. 5 Burr. 2802.
A Newmarket wager, upon the lives of the elder Mr. Pigot, and Sir Will. Codrington. Mr. Pigot's father died at two in the morning of the day the bet was made, in Shropshire.
Objection the contract void, as being without consideration. That it respected a future contingency, and that it was impossible Mr. Pigot should win.
Adj. that the nature of the contract, and the manifest intention of the parties, supported the verdict.
New trial refused.

A verdict having been found for the *plaintiff*, Mr. *Lee* moved on behalf of the defendant, for a new trial.

The cause was tried before Lord MANSFIELD. It was a contract made at *Newmarket*. The wager was originally proposed between young Mr. *Pigot*, the present defendant, and young Mr. *Codrington*, to run their fathers (to use the phrase of that place,) each against the other. Sir *William Codrington*, the father of Mr. *Codrington*, was then a little turned of fifty: Mr. *Pigot*'s father was upwards of seventy. Lord *Ossory* computed the chances, according to the above-mentioned ages of their respective fathers. Mr. *Codrington* thought the computation was made too much in his disfavour. Whereupon Lord *March* agreed to stand in Mr. *Codrington*'s place: and reciprocal notes were accordingly given between the earl and Mr. *Pigot*.

Mr. *Pigot*'s note ran thus,—"I promise to "pay to the Earl of *March*, 500 guineas, if "my father dies before Sir *William Codrington*. "*William Pigot*."

The earl's was—"I promise to pay to Mr. "*Pigot* 1600 guineas, in case Sir *William* "*Codrington* does not survive Mr. *Pigot*'s "father. *March*."

No

No mention was at all made, at the time of this tranſaction, about their father's being *then* dead or alive. But the fact was, that Mr. *Pigot*'s father was then actually *dead:* He died in *Shropſhire*, 150 miles from *London*, at two o'clock in the morning of the *ſame* day on which this bet was made at *Newmarket*, after dinner.

However, this fact was not, at that time, at all known to any of the parties; nor was there any reaſon for ſuſpecting that Mr. *Pigot*'s father was then dead. There was no objection made at the trial, againſt going into parol evidence. Lord *Mansfield* left the matter to the jury, who found a verdict for the plaintiff, with 525 l. damages.

The objection was, that the *contract was* VOID; it was without any *conſideration:* for there was no poſſibility of the defendant's *winning*, (his father being then actually dead;) and therefore he ought not to *loſe*. It was a contract in *futuro*, manifeſtly made upon the ſuppoſition of a *then future* contingency. The meaning can't be doubted: and the words ſufficiently expreſs that meaning. "If my "father dies before Sir *William Codrington*," is equivalent to ſaying, "If my father *ſhall* "die before Sir *William Codrington*." But his father was dead before he entered into this contract.

Mr. *Lee* ſaid, it was given in evidence, and is certainly true, that their fathers being dead, or being alive, made no difference in the proportion of the value of the chance: and he obſerved, that in the caſe of an inſurance upon a ſhip, if the words "loſt or not loſt," be not inſerted; and the fact ſhould happen to be, that the ſhip was actually loſt at the time

when the inſurance was made; the inſurance is void.

Rule to ſhew cauſe why there ſhould not be a new trial.

And now Mr. *Wallace*, Mr. *Dunning*, and Mr. *Mansfield*, on behalf of the plaintiff, ſhewed cauſe againſt a new trial being granted.

They ſaid that the inſertion of the words "loſt or not loſt," was peculiar to *Engliſh* policies: it is not inſerted in the policies of *other* nations. *Roccus fo.* 205. *No.* 175. And the reaſon there given (at the end of it,) namely, "that the fact being *unknown* will "not prejudice the inſurance," applies to the preſent caſe.

Suppoſing it to have related to the death of perſons in *India*, or the ſafety of the *Aurora*, can any one imagine that the inſurance would be void, becauſe the event had happened antecedent to the making of the contract?

The event of either of the two fathers being then already dead, did not occur to the parties. If it had, it would not have varied the bet. The two reciprocal notes undoubtedly mean one and the ſame event. Retroſpect is included, as well as futurity.

Mr. *Lee* and Mr. *Bolton*, for the defendant, replied, that by the law of *England* it is neceſſary to inſert the words "loſt or not loſt," in ſhip-policies: otherwiſe the inſurance is void, if the ſhip was then already loſt. And this, they ſaid, was expreſsly laid down by *Molloy*.

The bet went upon the idea that both fathers were then living: and ſo the evidence agreed. The bet was clearly future. If a bet be laid upon two horſes, and one is dead at the time, it is no bet.

The

The cafe of the *Mills* frigate was an infurance upon a fhip, which had a latent defect totally unknown to the parties: and the infurers were holden not liable, *upon account* of the fhip's being not *fea-worthy*, though fuch defect was *not known*.

Lord MANSFIELD.—I differ totally in opinion from that doctrine. The determination in that cafe, (which was made by my Lord Chief Juftice *Wilmot* and me, to whom it was referred,) was made quite upon another ground: and the change of opinion in the court of common-pleas happened upon the citing of two cafes that had been determined before me; which cafes were miftaken. The infured ought to know whether his fhip was fea-worthy or not, at the time when fhe *fet out* upon her voyage: but how fhould he know the condition fhe might be in, after fhe had been out a twelve-month?

If the prefent cafe had ftood upon written evidence only, it had been matter of law. But there was no objection made, at the trial, againft going into parol evidence.

The queftion is, " What the parties really " meant?" The material contingency was— " Which of thefe two young heirs fhould " come to his father's eftate firft?" It was not known that the father of either of them was then dead. Their lives, their healths, were neither warranted, nor excepted. It was equal to both of them, whether one of their fathers fhould be then fick or dead. All the circumftances fhew, that if it had been then thought of, it would not have made any difference in the bet; and there was no reafon to prefume that they would have excepted it.

The

The intention was, that he who came firſt to his eſtate, ſhould pay this ſum of money to the other, who ſtood in need of it. That the event *had* happened, was in the contemplation of neither party.

Both notes are ſo penned, as to be applied to what was *to happen.* But the nature of ſuch a contract, and the manifeſt intention of the parties, ſupport the verdict of the jury, (to whom it was left without objection,) "that "he who ſucceeded to his eſtate firſt, by the "death of his father, ſhould pay to the other," without any diſtinction whether the event had or had not, at that time, actually happened.

Mr. *Juſtice* ASTON.—It was originally intended to be a bett between two young heirs apparent; and the material point to be ſettled was, to fix the difference of the chances of the ſurvivorſhip, of their fathers. The mere ſurvivorſhip was the thing intended to be betted upon. The jury were the proper judges of the intention of the bett; and they have determined *what* that intention was. *If* it had ſtood ſingly upon the defendant's *note*, I ſhould have thought it *not* to be a good promiſe at the time of giving it. But taking the evidence and all the circumſtances *together*, it was proper to be left to the jury: and the jury, taking the circumſtances into conſideration, (and it was proper to take them into conſideration,) have determined it. I ſee no ground for granting a new trial.

The other two Judges concurred; and the court unanimouſly diſcharged the rule for a new trial.

Action for money had and received, and for money paid, laid out, and expended.

Towers v. Barrett, H. 26 G. 3. B. R. Durnford and East 1 V. 133.

Assumpsit for money had and received lies when a payment has been made on a contract which is put an end to, as where either by the terms of the contract it is left in the plaintiff's power to rescind it by any act, and he does it; or where the defendant afterwards assents to its being rescinded. But if it continue open, the plaintiff can only recover damages, and then he must state the special contract, and the breach of it.

On the trial of this cause before Lord *Mansfield*, at the sittings at *Westminster* after last *Michaelmas* term, it appeared that this suit was instituted by the plaintiff, to recover ten guineas, which he had paid to the defendant for a one-horse chaise and harness, on condition to be returned, in case the plaintiff's wife should not approve of it, paying 3s. 6d. *per diem* for the hire of it.

This contract was made by the defendant's servant, but his master did not object to it at the time. The plaintiff's wife not approving of the chaise, it was sent back at the expiration of three days, and left on the defendant's premises, without any consent on his part to receive it: the hire of 3s. 6d. *per diem* was tendered at the same time, which the defendant refused, as well as to return the money.

After a verdict had been given for the plaintiff, Sir *Thomas Davenport* obtained a rule to shew cause, why a nonsuit should not be entered, on the ground that this *action for money had and received* would not lie; but that it should have been on the *special contract*.

Erskine now shewed cause.

This case is very distinguishable from those of *Power* v. *Wells* (*a*), and *Weston* v. *Downes* (*b*), on which this rule was obtained. In the former of those cases, it was determined, that a *warranty could not be tried in an action for money had and received:* and in the latter, that such an action did not lie, the payment having been made on a *contract which was still open and disputed* by the defendant. But this is the very case put by Mr. Justice *Ashhurst* (*c*), where he said this action would have lain.

(*a*) Cowp. 818. Vide post.

(*b*) Dougl. 23. Vide post.

(*c*) Dougl. 24.

The

The principle is this, where a man enters into a contract for a sale, and he warrants that the object of that sale shall be of a certain denomination, and he does no act to disallow that contract, there money had and received will lie against him: but where the warranty is disputed, that must be tried in an action on the special contract. In the present case, there was no warranty: it was only a sale on condition, which failed. And it was held in *Moses* and *Macferlan* (*a*), that an action for money had and received will lie to recover money paid by mistake, or upon a consideration which happens to fail.

(*a*) 2 Burr. 1012

Sir *Thomas Davenport* in support of the rule.

Wherever there is a special contract, whether conditional or absolute, or in whatever terms it may be conceived, so long as that contract remains open to be disputed, and the party has done nothing to acknowledge the contract, or to preclude himself from entering into the nature of it, the defendant ought to have notice on the declaration, that he is sued on that contract.

The cases of *Power* v. *Wells*, and *Weston* v. *Downes*, are decisive as to the present. This comes within the principle laid down by Mr. J. *Buller*, in the latter of those cases, where he said, "where the contract is open, it must "be stated specially."

The chaise was left on the premises, but the defendant refused to receive it: then the question is, whether the plaintiff had a right to return it? And how that right is to be tried?—There are several matters here in controversy, which cannot be tried in an action for money had and received: 1st, Whether in fact there was any contract; 2dly, The extent

tent of it; and, 3dly, What the plaintiff ought to have paid *per diem* for the hire: for it is open on this declaration to say, that the defendant ought to have had 5 s. *per diem*, as well as 3 s. 6 d.

When the party has done any thing to preclude himself from going into the contract, then money had and received will lie: but here the defendant disputes it.

Lord MANSFIELD, *Ch. J.*—I am a great friend to the action for money had and received: it is a very beneficial action, and founded on principles of eternal justice.

In support of that action, I said in the case of *Weston* v. *Downes*, that I would guard against all inconveniencies, which might arise from it, particularly a surprise on the defendant; as where the demand arises on a special contract, it should be put on the record. But I have gone farther than that: for if the parties come to trial on another ground, though there happens to be a general count for money had and received, I never suffer the defendant to be surprised by it, unless he has had notice from the plaintiff that he means to rely on that, as well as the other ground.

But consistent with that guard, I do not think the action can be too much encouraged. Here there is no pretence of a surprise on the defendant: there is no other question to be tried. The defendant knew the whole of the matter in dispute as well as the plaintiff. On what ground can it be said that this is not money paid to the plaintiff's use? The defendant has got his chaise again, and, notwithstanding that, he keeps the money.

The case was well put by Mr. J. *Ashhurst*, in *Weston* v. *Downes*, and I think this is exactly

actly like that. I was of opinion at the trial that this action would lie; and I still continue of that opinion.

Willes, J.—The only difficulty is to distinguish this case from that of *Weston* and *Downes*; and I think it differs from that on two grounds.

That was an absolute, this a conditional, agreement. And another more material difference is, that this agreement was at an end: the contract was no longer open.

In the case of *Weston* and *Downes*, Mr. J. *Buller* said, "This action will not lie, as the "defendant has not precluded himself from "entering into the nature of the contract, by "taking back the last pair of horses:" but in the present case, the defendant has precluded himself by taking back the chaise. I think the verdict is right.

Ashhurst, J.—This action is maintainable; for it is different from the cases of *Weston* v. *Downes*, and *Power* v. *Wells*. The latter was merely a case of warranty. In these actions, the party cannot desert the warranty, and resort to the general count, because the warranty itself is one of the facts to be tried.

As to that of *Weston* v. *Downes*—on the first contract there was an agreement to take back the horses, provided they were returned within a month: that would have been like the present case, if they had been returned within that time; but there was an end of the first contract, for the plaintiff took a second, and then a third pair of horses: that was a new contract, not made on the terms of the first, and that is distinguishable from the present case.

But

But laying that determination out of the queſtion, this is like the common caſes, where either party puts an end to a conditional agreement. Here the condition was to return the chaiſe, if not approved of; therefore, the momrnt it was returned, the contract was at an end, and the defendant held the money againſt conſcience, and without conſideration.

BULLER, *J.*—On the very principle in *Weſton* v. *Downes*, and *Power* v. *Wells*, which determined, that the action for money had and received would not lie in thoſe caſes, it is clear that this action will lie.

It is admitted, that if the defendant had accepted the chaiſe, the action would lie: but it has been contended, that he did not receive it. Then let us ſee whether there is not ſomething equivalent to an acceptance? I think there is, from the terms of the contract.

There was nothing more to be done by the defendant; for he left it in the power of the plaintiff to put an end to the contract. Here it was not in his option to refuſe the chaiſe, when it was offered to him; he was bound to receive it; and therefore it is the ſame as if he had accepted it.

The diſtinction between thoſe caſes, where the contract is open, and where it is not ſo, is this: if the contract be reſcinded, either, as in this caſe, by the original terms of the contract, where no act remains to be done by the defendant himſelf, or by a ſubſequent aſſent by the defendant, the plaintiff is intitled to recover back his whole money; and then an action for money had and received will lie. But if the contract be open, the plaintiff's

 demand

demand is not for the whole fum, but for damages arifing out of that contract.

In a late cafe before me, on a warranty of a pair of horfes to Dr. *Compton*, that they were five years old, when in fact they turned out to be only four, and they were not returned within a certain time, I held, that if the plaintiff would refcind the contract intirely, he muft do it within a reafonable time, and that as he had not refcinded the contract, he could only recover damages; and then the queftion was, what was the difference of the value of horfes of four or five years old.

So that the difference, in cafes of this kind, is this: where the plaintiff is intitled to recover his whole money, he muft fhew that the contract is at an end; but if it continues open, he can only recover damages, and then he muft ftate the fpecial contract, and the breach of it.

Rule difcharged.

For the purpofe of farther elucidating the preceding fubject, the three following cafes are given, two of which are feveral times cited in the preceding cafe.

Stuart v. Wilkins, M. 19 G. III. B. R. Doug. 18. Affumpfit is a proper form of action, where there has been an exprefs warranty.

The two firft counts in the declaration in this cafe were as follows:—*David Stuart* complains of *James Wilkins* being, *&c.* For that whereas the faid *James*, on the 1ft day of *February*, in the year of our Lord 1778, at *Hatfield*, in the county of *Hertford*, offered to fell to the faid *David*, a certain mare of him the faid *James*, and whereupon afterwards, to wit, on the day and year aforefaid, at *Hatfield* aforefaid, in the county aforefaid, in confideration that the faid *David*, at the fpecial inftance and requeft of the faid *James*, would buy of him the faid *James*, the faid mare, at and for a

 certain

certain large price or ſum, to wit, the price or ſum of 31 l. 10 s. of lawful money of *Great-Britain*, to be paid by the ſaid *David* to the ſaid *James*, when he the ſaid *David* ſhould be thereunto afterwards requeſted; he the ſaid *James undertook, and then and there faithfully promiſed the ſaid David, that the ſaid mare was ſound*; and the ſaid *David* in fact ſaith, that he, confiding in the ſaid promiſe and undertaking of the ſaid *James*, ſo by him made as aforeſaid, afterwards, to wit, on the ſame day and year aforeſaid, at *Hatfield* aforeſaid, in the county aforeſaid, at the ſpecial inſtance and requeſt of the ſaid *James*, did buy of the ſaid *James* the ſaid mare, at and for the ſaid price or ſum of 31 l. 10 s. and did then and there pay to the ſaid *James* the ſum of 25 l. 5 s. part of the ſaid ſum of 31 l. 10 s. and did then and there undertake, and faithfully promiſe the ſaid *James*, to pay him the further ſum of 6 l. 5 s. reſidue of the ſaid ſum of 31 l. 10 s. when he the ſaid *David* ſhould be thereunto afterward requeſted: yet the ſaid *James*, not regarding his ſaid promiſe and undertaking ſo by him made as aforeſaid, but contriving and fraudulently intending to injure the ſaid *David* in this behalf, did not regard his ſaid promiſe and undertaking ſo by him made as aforeſaid, but craftily and ſubtilly deceived the ſaid *David* in this, that the ſaid mare, at the time of the making the ſaid promiſe and undertaking of the ſaid *James*, was not ſound, but on the contrary thereof was unſound, and was afflicted with a certain malady or diſeaſe, called the windgalls, to wit, at *Hatfield* aforeſaid, in the county aforeſaid; whereby the ſaid mare then and there became, and is of no uſe or value to the

 ſaid

ſaid *David.*—And whereas alſo the ſaid *James*, afterwards, to wit, the ſame day and year aforeſaid, at *Hatfield* aforeſaid, in the county aforeſaid, in conſideration that the ſaid *David*, at the like inſtance and requeſt of the ſaid *James*, had bought of him the ſaid *James*, a certain other mare of him the ſaid *James*, at and for a certain other large price or ſum, to wit, the ſum of 31 l. 10 s. of like lawful money, and had then and there paid to the ſaid *James* the ſum of 25 l. 5 s. in part of the ſaid laſt mentioned ſum of 31 l. 10 s. and had then and there undertaken and promiſed to pay to the ſaid *James* the further ſum of 6 l. 5 s. reſidue of the ſaid laſt mentioned ſum of 31 l. 10 s. when he the ſaid *David* ſhould be thereunto afterwards requeſted, *he the ſaid James undertook, and then and there faithfully promiſed him the ſaid David, that the ſaid laſt mentioned mare was ſound.*—Yet the ſaid *James*, not regarding his ſaid laſt mentioned promiſe and undertaking ſo by him made as aforeſaid, but contriving and fraudulently intending to injure the ſaid *David* in this behalf, did not regard his ſaid promiſe and undertaking ſo by him made as laſt aforeſaid, but craftily and ſubtilly deceived the ſaid *David* in this, that the ſaid laſt mentioned mare, at the time of the making of the ſaid laſt mentioned promiſe and undertaking of the ſaid *James*, was not ſound, but then was unſound, whereby the ſaid laſt mentioned mare became and is of no uſe or value to the ſaid *David.*" —To theſe were added a count for money laid out and expended, and another for money had and received.—The cauſe was tried at the aſſiſes at *Hertford*, before Lord MANSFIELD, and a verdict found for the plaintiff; but the evidence

evidence given being of an *exprefs* warranty, and a doubt being raifed whether, in fuch a cafe, this was a proper form of action, the verdict was taken, fubject to the opinion of the court on that queftion.

Upon the motion for fetting afide the verdict, and entering a nonfuit, Lord MANSFIELD faid, that it had been fuggefted, that the form of this declaration arofe from a determination of his at the fame place, about twenty years ago, but that that was a cafe of a clear fraud, and that it was declared on as a fraud.

Caufe was now fhewn againft making the rule abfolute.

Kempe Serjeant, and *Morgan*, for the *defendant*, contended that there are two forts of warranty, 1. exprefs, 2. implied.—That, in an exprefs warranty, the party is liable without alledging notice; but that it muft be laid *warrantizando vendidit*.—That every promife is executory, and refers to fomething to be done in future; whereas the declaration here charged the defendant with promifing a thing paft. They cited *Finch*, 180. *Dyer*, 75. *pl.* 23. *Bro. Abr. tit. Action fur le cafe pl.* 8. *Keilnay*, 91. 2 *Lord Raymond*, 1118. *Herne's Pleader*, 7, 77, 223. *Raftall*, 9. 1 *Ventr.* 365. *Alleyne*, 91. *Salk.* 210. *Fitz. N. B.* 98. *a.*

Lord MANSFIELD.—The declaration ftruck me as particular, in departing from the old rule of declaring exprefsly on the warranty. A warranty extends to all faults, known and unknown to the feller. Selling for a found price without warranty, may be a ground for an *affumpfit*; but, in fuch a cafe, it ought to be laid that the defendant knew of the unfoundnefs. I left it to the jury as on a war-

ranty, ſubject to the opinion of the court, whether a nonſuit ſhould not be entered. I am told by the learned judges on my left hand (ASHHURST and BULLER, *Juſtices*,) that this ſort of declaration, where a warranty is to be proved, has been practiſed for twenty years, and that it is made uſe of with a view to let in both proofs if neceſſary.

ASHHURST, *Juſtice.*—Whatever may have been the old form, I believe it has been long ſettled that this form of action is right; and, having been long eſtabliſhed, I am of opinion that it ought to be ſupported. There may be caſes where the count for money had and received, may be of uſe to the plaintiff, and the warranty including the promiſe, may be declared on as ſuch.

BULLER, *Juſtice.*—This mode has been in uſe ever ſince I have known any thing of practice, and my brother ASHHURST remembers it much longer. There is no objection to it, in point of form, which could prevail even on a ſpecial demurrer. Promiſes are not all executory. Do not all our law books make a diſtinction between promiſes executed, and promiſes executory;—that in one, you may traverſe the conſideration, in the other not? Becauſe another action would lie, it does not follow that this will not. It was determined in *Slade*'s caſe, that there may be different actions for the ſame injury (*a*).

(*a*) T. 44 Eliz. 4 Co. 92. b.

Weſton v. Downes, M. 19 G. III. B. R. Doug. 23. Aſſumpſit for money had and received, will not lie when the payment has

This was an action for money had and received by the defendant, to the uſe of the plaintiff. On the trial, before Lord MANSFIELD, the plaintiff proved that the defendant, in conſideration of ſeventy guineas, had ſold him a pair of coach horſes, which he undertook to take back, if the plaintiff ſhould diſapprove

approve of them, and return them within a month. The plaintiff did return them within a month, but took another pair from the defendant in their ſtead, without making any new agreement. Theſe he alſo returned within a month, and received a third pair on the 23d of *December*, without any freſh bargain. This third pair he diſapproved of, becauſe they were reſtive, and would not draw, and offered to return them on the 5th of *January*; but the defendant refuſed to take them back.

been made on a contract which is ſtill open, and not given up by the defendant.

Lord MANSFIELD directed a nonſuit; and, on a rule to ſhew cauſe why the nonſuit ſhould not be ſet aſide, and a new trial granted, the queſtion was, whether the action of *aſſumpſit* for money had and received, would lie in this caſe.

Dunning and *Davenport*, for the plaintiff, contended, that there was an end of the contract on the return of the firſt pair of horſes, and that then a right accrued to bring this action.

The *Solicitor General*, for the defendant, inſiſted, that the contract was continued by taking other horſes, and that the plaintiff ought to have declared upon the ſpecial agreement.

Lord MANSFIELD.—I am a great friend to the action for money had and received; and therefore I am not for ſtretching, leſt I ſhould endanger it. Where there is a ſpecial contract, the defendant ought to have notice, by the declaration, that he is ſued upon that contract.

WILLES, *Juſtice*, of the ſame opinion.—Here was originally a ſpecial contract, and it continued between the parties through all their ſubſequent dealings.

Ashhurst, *Justice.*—If the plaintiff had demanded the seventy guineas, and brought his action on the return of the first pair of horses, and no second pair had been sent, this action would have lain; but here the contract was continued, and the case resembles one that was tried before me on the midland circuit, and afterwards came on in this court, *viz.* *Power* v. *Wells*, *E.* 18 *Geo. III.* (*a*).

(*a*) Vide post.

Buller, *Justice.*—This action will not lie, as the defendant has not precluded himself from entering into the nature of the contract, by taking back the last pair of horses. Where the contract is open, it must be stated specially. In *Power* v. *Wells*, the defendant had warranted a horse to be sound, which proved unsound. The plaintiff tendered a return of the horse, but the defendant refused to receive him, and an action for money had and received being brought, it was held by the court, that it would not lie.

The rule made absolute for a nonsuit to be entered.

Power v. Wells, Idem v. Lundem, E. 18 G. III. B. R. Cowp. 818. If money and a horse are given in exchange for another horse warranted sound, which was unsound at the time, an action for money had and received, is not a proper action to try the warranty;—nor will trover lie for the horse given in exchange, because the property is altered.

Upon shewing cause against a new trial, in the above causes, Mr. Justice *Ashhurst*, before whom they were tried, reported as follows:

The *first* was an action for *money had and received*, brought to recover a sum of twenty-one pounds, paid by the plaintiff upon the exchange of a mare of his, for a horse of the defendant; which the defendant *warranted* to be sound, but which was clearly proved to be unsound at the time. Immediately upon discovering that the horse was unsound, the plaintiff sent it back, together with a letter, by a person who put the letter and halter into the defendant's hands, in the defendant's yard, but he refused to take them. The person, at the

the ſame time demanded the twenty guineas, and the plaintiff's mare given in exchange; but the defendant ſaid he had ſold her; that he would have nothing to do with the perſon ſent by the plaintiff, and turned him out of his yard. Upon which the plaintiff brought both the above actions.

The *ſecond* was an action of *trover* for the mare: both cauſes ſtood for trial in the paper together. As to the firſt, an objection was made at the trial to the form of the action, and I was very doubtful how far it was maintainable. But it was agreed that I ſhould ſum it up to the jury, and if they ſhould be of opinion with the plaintiff upon the facts proved, then, inſtead of making a ſpecial caſe, it ſhould be put in the form of a motion for a new trial. The jury found for the plaintiff. As to the ſecond action, it was agreed that a verdict ſhould be taken for the plaintiff, upon the evidence given in the firſt cauſe, but with liberty to move for a new trial; and it was underſtood between the parties, that the defendant ſhould be entitled to the ſame redreſs in both cauſes, in caſe the opinion of the court ſhould be in his favour, as if the whole had been ſtated in the form of a caſe.

Upon ſhewing cauſe, the queſtion was, whether the above actions were rightly conceived? or, whether the plaintiff ſhould not have brought a ſpecial action on the caſe? Mr. *Wheler*, for the plaintiff. Mr. *Newnham* for the defendant.

The *court* were of opinion that *both* actions were *miſconceived*. 1ſt. The action for *money had and received*, with *no other count*, was an improper action to try the *warranty* *. 2d. The action of *trover* could not be maintained, becauſe

* Vide Stuart v. Wilkins, ante, and note the difference between a count for money had

had and received only, and an action of assumpsit, to try the warranty.

cause the property was *transferred* by the *exchange*.—Accordingly a nonsuit was ordered to be entered up in each cause.

Tindal and others against Brown. E. 26 Geo. III. B. R. Durnford and East. 1 V. 167. If the holder give time to the acceptor of a bill, or drawer of a note, after it has been dishonoured, the indorser is discharged. Notice of a bill of exchange or promissory note, being dishonoured, must come from the holder. What is reasonable notice to the indorser of non-payment by the drawer of a promissory note or acceptor of a bill of exchange, is partly a question of fact, and partly a question of law.

This was an action by the indorsees of a promissory note against the indorser.

The cause first came on to be tried at the sittings after *Easter* term, 1785, before Lord MANSFIELD, at *Guildhall*, when the jury found a verdict for the plaintiffs. On a motion for a new trial in last *Trinity* term, the facts appeared to be to the following purport: * *that* on the 21st of *August*, 1784, the note in question was made by one *Donaldson*, for 35l. 2s. payable six weeks after date; that on the 5th *October*, 1784, the day on which the note became due, allowing for the three day's grace, one *Howell* (the plaintiffs clerk) called on *Donaldson*, at ten in the morning, and, not finding him at home, regular notice of the demand of payment of the money contained in the note was left at the house of *Donaldson*; that on the 6th of the same *October*, between the hours of 10 and 11 in the forenoon, he called again on *Donaldson*, who promised that the said note should be taken up before the bank was shut on that day, within the banking hours, which were from 9 to 4 o'clock in the afternoon of each day. That the note not being taken up that day, he called again on *Donaldson*, on *Thursday*, the 7th, and not finding him at home, he was sent to the defendant *Brown*, to tender the note, who rerefused to pay it, saying the plaintiffs had made it their own.

* The facts are taken from a special verdict, afterwards found in this cause.

Donaldson

Donaldson proved at the trial, that immedately on his parting with *Howell*, on *Wednesday*, the 6th, he went to *Brown*'s house, and not finding him at home, he left a message with his wife that the note was due, that he (*Donaldson*) could not pay it, desired that *Brown* would take it up, adding that he would make it good to him.

That all the parties lived at *Bristol*, within twenty minutes walk of each other.

After argument by *Lee* and *Morgan*, for the plaintiffs, and *Cowper* and *Baldwin*, for the defendant, the court delivered their opinion to the following effect.

Lord Mansfield.—On full consideration, I am now decidedly of opinion that there ought to be a new trial. It is of great consequence that this question should be settled. Certainty and diligence are of the utmost importance in mercantile transactions. It is extremely clear that the holder of a bill, when dishonoured by the acceptor, must give reasonable notice to the drawer or indorser. What is reasonable notice is *partly a question of fact*, and *partly a question of law*. It may depend in some measure on facts; such as the distance at which the parties live from each other, the course of the post, &c. But wherever a rule can be laid down with respect to this reasonableness, that should be decided by the court, and adhered to by every one for the sake of certainty. I cannot form to myself an idea of the ground on which the jury went in giving this verdict. Did they conceive the rule to be that the holder might delay giving notice for two days, or what other time did they mean to allow him? Here an earlier notice might certainly have been given, as all the parties lived

lived within twenty minutes walk of each other. The bill was dishonoured on the 5th, the clerk saw the maker on the 6th, and gave him time during the banking hours of that day; and the plaintiffs did not go at four that afternoon, but waited till the next day. It has been held (*a*), that where the party liable, does not live in the same place, the holder must write by the next post after the bill is dishonoured. It was well observed by the counsel, that the juries were obstinate in the case of *Metcalf* and *Hall* (*b*), where they struggled so hard, in spite of the opinion of the court, to narrow the rule, that they held you must in certain cases demand payment on a banker's draft within an hour. Here the struggle is to give a greater latitude than is necessary. It was once doubted (*c*) whether notice within fourteen days was not sufficient. For the sake of diligence and certainty, I am of opinion there should be a new trial.

(*a*) Vide Dougl. 497.

(*b*) Tr. 22 Geo. III. B. R.

(*c*) Vide Ball. N. P. 274, 276.

WILLES, J.—I agree that there ought to be a new trial. New credit was given to the maker on the 7th, the plaintiffs clerk went first to *Donaldson* to demand the bill of him, and after that they sent it to the defendant. As to the notice, I cannot consider the notice given by the maker equal to that given by the indorser. The plaintiffs have not acted with legal diligence.

ASHHURST, J.—It is of dangerous consequence to lay it down as a general rule, that the jury should judge of the reasonableness of time. It ought to be settled as a question of law. If the jury were to determine this question in all cases, it would be productive of endless uncertainty. The next day at the most, is as long as is necessary in a case circumstanced

cumſtanced like this. If the parties live at a ſmall diſtance, this is ſufficient time: if at a greater, they ſhould write by the next poſt. Notice means ſomething more than knowledge; becauſe it is competent to the holder to give credit to the maker. It is not enough to ſay that the maker does not intend *to pay*, but that he (the holder) does not intend to give credit. In the preſent caſe there is no notice; for the party ought to know whether the holder intends to give credit to the maker, or whether he intends to reſort to the indorſer.

BULLER, J.—The numerous caſes on this ſubject reflect great diſcredit on the courts of *Weſtminſter*; they do infinite miſchief in the mercantile world: and this evil can only be remedied by doing what the court wiſhed to do in the caſe of *Metcalf* and *Hall*; by conſidering the reaſonableneſs of time as a queſtion of law, and not of fact.* Whether the poſt goes out this or that day, at what time, *&c.* are matters of fact: but when thoſe facts are eſtabliſhed, it then becomes a queſtion of law on thoſe facts, what notice ſhall be reaſonable.

As to giving time the holder does it at his peril. And that circumſtance alone would be ſufficient to decide this caſe. For in no caſe has it been determined, that the indorſer is liable, after the holder of the note has given time to the maker.

With reſpect to notice, I concur in the opinion which has been given by the court, and particularly for the reaſon given by my brother ASHHURST. The purpoſe of giving notice is not merely that the indorſer ſhould know the *note* is not paid, for he is chargeable only in a ſecondary degree; but to render him liable you muſt ſhew that the holder looked

to

to him for payment, and gave him notice that he did ſo. A caſe might eaſily be put, where the indorſer might have notice from the holder, and yet would not be liable; as if in the preſent caſe the holder had written a letter to the indorſer, containing the circumſtances which have been given in evidence, the indorſer would have been diſcharged; becauſe it would have amounted only to this, "the note "made by *Donaldſon*, and indorſed by you, is "not paid, and I have given credit to *Donaldſon* "'till to-morrow." Though there is no preſcribed form of this kind of notice, yet it muſt import that the holder looks on the indorſer as liable, and expects payment from him, that he may have his remedy over by an early application. Then it becomes his buſineſs to take up the note. But notice of having given credit to the maker, will diſcharge the indorſer. The notice by another perſon to the indorſer, can never be ſufficient; but it muſt proceed from the holder himſelf.

The rule for a new trial being made abſolute,

This cauſe was heard a *ſecond* time before *Buller*, J. at the ſittings at *Guildhall*, after laſt *Hillary* term, when in addition to the evidence given on the former trial, one *Weeks*, the defendant's attorney, was called, who ſwore, that in a converſation which he held with *Donaldſon*, on *Thurſday* the 7th of *October*, concerning the note in queſtion, *Donaldſon* told him he was that moment come from *Brown*'s, where he had left a meſſage with Mrs. *Brown*, deſiring her huſband to take up the note; that the reaſon why he was ſo exact as to the particular day, and the expreſſion made uſe of by *Donaldſon*, was becauſe he kept a minute of all his tranſactions; that his minute was con-

firmed

firmed in this respect by his memory; and besides, that at a meeting between the parties before the action was brought, this fact was admitted on both sides. This jury, which was a special one, likewise found for the plaintiffs.

Cowper having moved this term for a second new trial, on the ground, that this was a verdict against law,

Erskine now shewed cause, and admitted that it was not now to be disputed, that what should be considered to be a reasonable time, was a question of law; but contended, that in this case the plaintiffs had used due diligence, and had given the defendant notice within a reasonable time. That *Donaldson* ought to be considered as the agent of the plaintiffs for the purpose of giving notice to the defendant. That there was a contradiction as to the time when this notice was first given to the defendant, whether on the 6th or 7th of *October*, which contradiction arose from the testimony of *Weeks*, who was not produced at the former trial, which circumstance might have afforded the jury some room for suspicion: but this was a point proper for the determination of the jury who had decided it. That at all events, the court should be extremely cautious in granting a *third* trial; particularly as the sum in litigation was so small. That in *Metcalf* and *Hall*, which involved a similar question, the court had refused to grant a third trial.

The counsel on the other side were stopped by *the court*, who referred to their former decision, and added, that even if the application had been made to the defendant on the 6th, it would have been too late, because the plaintiffs had given credit to the drawer. That though it was true in general, that the court would refuse to grant

a new

a new trial, when the ſum in litigation was ſmall, yet that rule did not apply, where a verdict had been given *againſt law*. That the reaſon why the court refuſed granting a third trial, in the caſe of *Metcalf* and *Hall*, was, becauſe the plaintiff had proved his debt under a commiſſion of bankrupt, which had iſſued againſt the drawees of the bill, between the time of the verdict and the motion for a new trial.

Rule abſolute.

This cauſe was tried a third time, and that the point might be ſolemnly ſettled, the parties conſented to have a ſpecial verdict found, which was done according to the facts firſt ſtated, *Weeks*'s evidence not making a part of it. *Morgan* was to have argued for the plaintiffs, but as the court of *B. R.* had given two decided opinions againſt his clients, he did not think proper to argue it before that court.—Judgment was therefore given for the defendant, and a writ of error was brought in the exchequer chamber, and argued by *Morgan* for the plaintiffs in error, *Baldwin* for the defendant. *Morgan* made two points; one, that the *notice* given by *Donaldſon* was the ſame as if given by the plaintiffs, and that the defendant had ſufficient notice: another, that whether the notice was or was not ſufficient and reaſonable, was a mere queſtion of *fact*, and ought to have been determined by the jury, and therefore a *venire facias de novo* ought to be awarded.—The court determined againſt the plaintiffs in error upon both points, and affirmed the judgment of the king's-bench.

Caldwell and others againſt Ball. E. 16 G. III. B.R. Durnford and Eaſt. 1 V. 205.

TROVER for fifty hogſheads, and one hundred and twenty tierces of ſugar, and thirty puncheons of rum.

On

On a motion to set aside the verdict, which had been given for the *defendant* in this cause, and to grant a new trial, WILLES, justice, before whom this cause was tried, at the last assises at *Lancaster*, made the following report.

Where several bills of lading have been signed, of different imports, no reference is to be had to the time when they were signed by the captain; but the person who first gets one of them by a legal title from the owner or shipper, has a right to the consignment.—And where such bills of lading, tho' different upon the face of them, are constructively the same, and the captain has acted bonâ fide, a delivery according to such legal title will discharge him from them all.

The question arises upon two bills of lading signed by the defendant, who was captain of the ship *Tyger*, under one of which bills of lading the plaintiffs claim.

Thompson, the shipper of the goods in question, was a considerable planter in the island of *Jamaica*, and corresponded with *Fairbrother*, a merchant residing at *Liverpool*. Previous to the 19th *August*, 1784, *Fairbrother* had acted as the *general agent* or consignee of *Thompson*, but from that time his *general* agency ceased, in consequence of a power of attorney to *Dorothy Thompson* and *Bromfield*, which superseded his authority. From that time, whatever act was done by *Fairbrother* on behalf of *Thompson*, was by virtue of a special order or commission for that specific purpose.

The above-mentioned power of attorney to *Dorothy Thompson* and *Bromfield*, authorised them *to raise money for the use of Thompson*, whose affairs were then much involved, *and to make a mortgage upon his estates in Jamaica*. It likewise empowered them to enter into any contract that they should think fit for consigning and shipping any sugar, or produce, made on any of the plantations.

At the time that this power arrived in *England*, *Thompson* was indebted to the house of *Caldwell* and Company, the present plaintiffs, who were merchants of *Liverpool*, in the sum of 4000 l. By way of a security for this debt, *Dorothy Thompson* and *Bromfield* gave the plaintiffs a mortgage dated the 20th of *March*, 1785,

 for

for 7000 l. upon the plantations in *Jamaica*; and likewise entered into a *covenant for the future consignment of Thompson's sugars to them.*

By a subsequent indenture, dated 10th. of *May*, 1785, and executed between the same parties, after reciting the above-mentioned mortgage, it was declared, " that whereas " the sum of 4000 l. or thereabouts, part of " the *said sum of* 7000 *l. at the time of the* " *execution of the said indenture*, was actually " owing by the said *T. P. Thompson*, to the " said *C. Caldwell* and Company, for which " they have the bond of the said *T. P. Thompson*, " and others, and the further sum of 100 l. " has been also advanced to the said *T. Brom-* " *field*, as the attorney of the said *T. P. Thompson*, " and the remainder of the said sum of 7000 l. " was intended to have been so advanced; " but doubts having arisen as to the force and " validity of the power of the said *T. Brom-* " *field*, to charge with effect the said planta- " tion and premises, and it being uncertain " what sum of money the said plantation and " premises are already mortgaged for, and " what other circumstances affect the same, " it has been agreed that the said indentures " of lease and release, (meaning the before- " mentioned mortgage) shall be sent out to " *Jamaica*, to the correspondent of the said " *Charles Caldwell* and *Thomas Smyth*, to be " recorded in the said island, and for inform- " ation how the said estate is affected by former " incumbrances, and that so soon as the said " plantation, lands, and premises, are effec- " tually made liable to the payment of the " said sum of 7000 l. and interest, according " to the terms of the said indenture of release, " and the said *Charles Caldwell* and *Thomas*

" *Smyth*,

" *Smyth*, are well satisfied that the same are a
" good and sufficient security for the said sum
" of 7000 l. and interest; and *are also satisfied,*
" *that the said Thomas Pepper Thompson will*
" *consign the produce of the said plantation to the*
" *said Charles Caldwell and Thomas Smyth, ac-*
" *cording to the terms of the said indenture of*
" *release*, then and not until then, the said
" *Charles Caldwell* and *Thomas Smyth* are to
" advance unto the said *Thomas Bromfield*, as
" attorney for the said *Thomas Pepper Thompson*,
" the remainder of the said sum of 7000 l.
" And in the mean time no interest for more
" than is or may be actually advanced, is to
" be charged or payable. But it is fully un-
" derstood amongst the parties, that the said
" *Charles Caldwell* and *Thomas Smyth*, are not
" to be under any obligation of advancing any
" more money than they have done already,
" until they are fully satisfied with the pro-
" priety thereof, and are content to do so."

At the time this indenture bore date, the house of *France* and Company, merchants at *Liverpool*, were also creditors of *Thompson*, to the amount of 3000 l. for money advanced to him some time before, through the hands of their agents in *Jamaica*, Messrs. *Coppell* and *Goldwin*; and *Thompson*, to discharge this demand, had drawn two bills of exchange, bearing date the 28th *July*, 1784, upon *Dorothy Thompson* and *Thomas Bromfield*, payable at ninety days sight, in favor of Messrs. *Coppell* and *Goldwin*, who indorsed the same to the order of *France* and Company.

Extract of a letter from Thompson to Fairbrother, dated the 6th of December, 1784, from Jamaica.

" I have now the pleasure to inform you,
" that I have a most pleasing prospect of a

" crop, which, avoiding accidents, I hope
" will enable me to take up *those heavy bills*
" when due, which my sister (*Dorothy Thompson*)
" will inform you of, and *for which I*
" *shall ship* 200 *casks on the Tyger, Captain Ball*,
" who expects to sail in all next month."

Extract of a letter from Thompson to Fairbrother, dated Jamaica, 23d January, 1785.

" I shall wait upon Messrs. *Coppell* and
" *Goldwin*, to desire them to write to Messrs.
" *France* and Company, relative to the bills
" drawn in their favor. We are making fine
" sugar, and a large quantity of it. *I hope*
" *you will make Messrs. Caldwell and Company*
" *satisfied until I have the pleasure of seeing*
" *them*, which will be soon, as I am, please
" God, determined to leave this island in all
" *July* next, in the packet."

Extract of a letter from Thompson to Fairbrother, dated Jamaica, 15th March, 1785.

" I shall have on board the *Tyger* one hun-
" dred and seventy hogsheads and tierces,
" and thirty puncheons, most of which are
" already on board. She will sail the beginning
" of *April*.

" *N. B.* With respect to insuring what I
" shall have on board the *Tyger*, I shall leave
" it to your own option. Should she be long
" on her passage you might get insurance for
" 2000 l. as we could not well bear a loss
" just now."

On the same day on which the last mentioned letter from *Jamaica* was written to *Fairbrother*, he, being applied to by Messrs. *Caldwell* and Company for payment of *Thompson*'s debt, wrote the following answer to them.

" *Messrs.*

" *Messrs. Caldwell and Company,*

" In consequence of your application to " me for money on account of *Mr. Thompson,* " I am sorry to inform you, that I have no- " thing wherewith to pay. A letter from " that gentleman acquaints me, that *he will* " *ship two hundred casks of sugar and rum on* " *board the Tyger, Captain Ball.* I will be " obliged to you, if you will order insurance " on these goods.

T. Fairbrother."

Liverpool, 15 *March,* 1785.

On the 18th of *March,* 1785, the defendant signed *the bills of lading* in question.

One of these bills of lading for the whole cargo, which was acknowledged to have been the first signed by the defendant, was to deliver to *Messrs. Thompson and Fairbrother, or their assigns*; this was indorsed by *Thompson* in *Jamaica,* and sent by him to *Fairbrother* in *England,* where it arrived on the 20th of *May,* inclosed in the following letter.

Jamaica, 18th *March,* 1785.

" I send you inclosed a bill of lading, for " what goods I have got on board the *Tyger.* " *This will acquaint you of my being obliged to* " *assign the other bills of lading to Coppel and* " *Company, for the security of the payment of* " *the bills drawn in their favour, &c.*"

A short time after the receipt of this letter, *Fairbrother* indorsed the bill of lading abovementioned to Messrs. *Caldwell* and Company, the present plaintiffs; who, after they were in possession of it, advanced two sums, amounting together to 219l. 13s. 8d. for the use of *Thompson.*

 The

The other two bills of lading for different parts of the cargo, making up the whole together, were to deliver *to the order of the ship-per or his assigns*, and indorsed by *Thompson* as follows: "Deliver the within to Messrs. *Thomp-*" *son* and *Fairbrother*, provided they engage "to pay the nett proceeds to Messrs. *France* "and Nephew; otherwise, deliver them to "the order of *James France* and Nephew, on "account of *Coppell* and *Goldwin*."

These last bills of lading had been delivered into the hands of *Coppell* and *Goldwin*, by *Thomp-son*, at the time when he wrote the letter of the 18th of *March*, 1785, to *Fairbrother*, as appeared by that letter, and were afterwards received by *France* and Company, on the 6th of *June*, 1785, in a letter from Messrs. *Cop-pell* and *Goldwin*, dated 16th *April*.

Captain *Ball*, the defendant, arrived at *Li-verpool* on the 19th of *June*, 1785, having on board his ship the goods in question.

The day after his arrival, the plaintiffs demanded the goods of him, when he acknowledged the bill of lading, but said that he could not deliver the goods without the consent of the owners of the ship, who were *France* and Company.

On the next day the plaintiffs saw *France*, and repeated their demands, tendering, at the same time, all charges of freight, &c. *France* said, that neither he nor the captain would deliver the goods, unless upon a promise that the nett proceeds should be paid to him. This was refused by the plaintiffs.

Willes, J. then observed, that, on the trial, several points had been made by the plaintiffs.

1st, That the captain had no right to retain the goods in question, for that he was liable in an action of trover on the bill of lading signed by him.

But in answer to it, he had considered this in reality as an action between the plaintiffs and *France* and Company, and that the defendant, who was captain of the ship, was merely a trustee for one or the other, and was indemnified in the mean time. That he was in a similar situation to a sheriff, when contrary demands are made by the assignees of a bankrupt and a creditor claiming under an execution.

2dly, It was insisted that the defendant had done wrong, in refusing to deliver the goods according to the first bill of lading signed, by which he had bound himself.

As to this point, he had left it to the jury to consider of, under the particular circumstances in which all the parties stood. He had represented to them, that the defendant was master of *France* and Company's ship, and was charged to deliver the goods to them by *Coppell* and *Goldwin*.

That the conduct of *Fairbrother* was in some degree culpable, in assigning the bill of lading over to the plaintiffs immediately after he had received it, against what he knew to be the design of his principal.

And that as the plaintiffs, and *France* and Company, were both fair creditors, and *bonâ fide* holders of the bills, he who had first got possession by a legal title, ought to be preferred; and that for this purpose the possession of *Coppell* and *Goldwin* was to be considered as the possession of *France* and Company.

 3dly, It

3dly, It was objected, that *France* and Company were not creditors of *Thompson*, because the bills of exchange were not due, and therefore that they had no equitable lien on the goods.

But that was answered, by saying that the consideration for these bills had actually been advanced by *France* and Company.

4thly, It was insisted that the consignments of these goods was bound by the mortgage to the plaintiff, executed by *Bromfield*, under the power of attorney.

This was answered, by saying that the mortgage did not affect this transaction, being subsequent in point of time; that at all events it was only a covenant which bound the covenanter personally.

Under these directions, the jury had given their verdict for the defendant, which he had no reason to disapprove of.

Scott, *Wood* and *Law*, shewed cause against the rule, and directed their arguments to two grounds, on one of which they supposed that the plaintiffs meant to rely.

1st, That the bill of lading indorsed to them, being actually signed before the other, vested such a property in them, as enabled them to maintain this action. Or,

2dly, That under the agreement to consign to them in the mortgage deed, they had a right to these goods.

They observed, that, in order to clear this transaction, it was necessary to consider the different relations of the parties to each other.

After *August* 1784, *Fairbrother* no longer acted as the general agent of *Thompson*, but under a special direction accompanying each cargo consigned to him: therefore he had no longer

longer the arbitrary diſpoſition of *Thompſon*'s property. *Bromfield* was at that time appointed the *general agent.* The nature of this connection between *Fairbrother* and *Thompſon*, was perfectly well known to the preſent plaintiffs. Previous to their getting poſſeſſion of the firſt bill of lading, the plaintiffs had taken a mortgage on *Thompſon*'s eſtate, for 7000 l. for a debt of 4000 l. only.

At this time, *France* and Company were alſo creditors of *Thompſon*, upon bills of exchange drawn by him, to the amount of 3000 l. for money which had been advanced to him, through the hands of *Coppell* and *Goldwin*, who were agents of *France* and Company. Under theſe circumſtances the bills of lading were ſigned, *Thompſon* intending that *Fairbrother* ſhould apply theſe goods in diſcharge of the bills of exchange which were in the poſſeſſion of *France* and Company.

But the plaintiffs contend, that the bill of lading which conſigned the goods to *Fairbrother*, having been actually firſt ſigned by the defendant, and *Fairbrother* having afterwards indorſed it over to them, the defendant is concluded by his own act. In anſwer to this, they obſerved, that *Fairbrother* being merely the agent of *Thompſon* for a ſpecific purpoſe, and not having a general power over the conſignment, which was known to the defendant, it was nothing more than an undertaking by him to deliver the goods to *Fairbrother*, for the purpoſe of being diſpoſed of according to directions from *Thompſon*: and therefore, as between *Thompſon* and *Fairbrother*, under whom the plaintiffs claim, *Fairbrother* had indorſed this bill of lading over to the plaintiffs, without any authority, and againſt con-

 ſcience;

ſcience: and there being a general communication between *Fairbrother* and the plaintiffs, that they either had, or might have had notice, unleſs they were guilty of great negligence. That theſe goods were originally devoted to take up the bills which were in the poſſeſſion of *France* and Company.

But even ſuppoſing that any ſtreſs is to be laid upon the plaintiffs bill of lading having been the firſt actually ſigned, yet that will have no weight under theſe circumſtances; for, according to the nature of *Fairbrother's* authority, if *Thompſon* had merely ſent him a letter, ordering him to deliver the nett proceeds of the goods to *France* and Company, that would have been ſufficient. Then there is no good ground to repreſent theſe bills of lading as inconſiſtent; for the ſecond bill of lading amounted to no more than a ſpecial appropriation of the goods which were to be delivered to *Fairbrother* under the firſt bill of lading, and came in lieu of a letter, or other ſpecific order from *Thompſon*. The defendant therefore, being appriſed of the mode of dealing between *Fairbrother* and *Thompſon*, only bound himſelf to deliver the property to *Fairbrother*, as the ſpecial agent of *Thompſon*, and *Fairbrother* was afterwards to deliver the nett proceeds according to further directions from *Thompſon*, which were contained in the ſecond bill of lading. Defendant, therefore, has complied with his duty, for the goods were offered to be delivered to the plaintiffs, provided they would promiſe to pay the nett proceeds to *France* and Company.

It is not contended that any money was advanced by the plaintiffs, at the time of aſſigning over the bill of lading to them; but it is ſaid

faid that two fmall fums were afterwards advanced by them, on the credit of the bill of lading; but it is much to be doubted whether the money was advanced on that account; for the plaintiffs had, at that time, a large mortgage on *Thompfon*'s eftate, which was more than fufficient to cover their debt. And indeed the fums advanced were fo fmall, that they could only be colourable, for they muft have known that they were not fufficient to anfwer the preffing demands of *Thompfon*. Befides, if the fact were fo, it was done at their own peril, under notice of *Fairbrother*'s limited authority; for, before that time, they had treated with *Bromfield* as the general agent of *Thompfon*.

Fairbrother was, during all this tranfaction, in the habit of communicating his letters to the plaintiffs. In the letter dated 6th *December*, 1784, *Thompfon* took notice that he had heavy bills outftanding againft him, for the payment of which, he fhould fhip two hundred hogfheads on board the *Tyger*, Captain *Ball*. It was clear, therefore, from that letter, which the jury had a right to prefume that the plaintiffs had feen, that the goods in queftion were fent to *Fairbrother* to take up thofe bills, which were in the poffeffion of *France* and Company, for there were no other *heavy bills* except thofe. The plaintiffs muft have known, therefore, that there was a fpecial lien meant to be fixed on this property; and the letter of the 23d *January* confirmed it, becaufe it fhewed that *Thompfon* held the fame intention that he had manifefted in the former letter; and is alfo very important, becaufe it proves negatively, not only that *Thompfon* had *no idea* of fending the goods to the plaintiffs,

plaintiffs, but that he had alſo *expreſsly intended* to exclude them; for he deſired *Fairbrother* to call upon them, and make them ſatisfied 'till he came to *England*.

No argument in favour of the plaintiffs can be drawn from the circumſtance of their having inſured this cargo by the direction of *Fairbrother*, he himſelf having no authority from *Thompſon* to order any ſuch inſurance 'till the receipt of the letter of the 15th *March*, which was long afterwards: and it was groſs negligence in the plaintiffs, knowing *Fairbrother*'s limited commiſſion, not to demand a ſight of his authority for making ſuch an order.

It was therefore for the jury to determine, under all theſe circumſtances, whether the plaintiffs had or had not actual notice, that theſe goods were conſigned to *Fairbrother*, for the ſpecial purpoſe of paying the bills in the hands of *France* and Company; and the verdict has determined that they had.

Hitherto this caſe has only been conſidered on the preſumption of fraud or wilful negligence on the part of the plaintiffs: but, in point of law, this property was veſted in *France* and Company, before the plaintiffs were in poſſeſſion of their bill of lading. All the bills of lading had an exiſtence when the letter of the 18th of *March* was written. *Thompſon* had then put the ſecond bill of lading into the hands of *Coppell* and *Goldwin*, for the uſe of *France* and Company. The firſt bill of lading was at that time, and long afterwards, in abeyance, it not having reached *Fairbrother*. Therefore not only the right of property was veſted in *France* and Company in point of law, but they were alſo in poſſeſſion in point

of fact, for the goods were actually on board a ship belonging to them.

At all events, the agent could do no more than the principal. Had *Thompson* himself been in *England*, he could not have delivered this cargo to the plaintiffs, after *Coppell* and *Goldwin* had been put in possession of the bill of lading.

2dly, As to the mortgage, allowing it to have been warranted by the power of attorney, it could make no difference in this case, as between the plaintiffs and *France* and Company; for the covenant to consign the produce of *Thompson*'s estate, could only be binding upon him, and could not affect *France* and Company, who were in possession under a legal title in the mean time. But this mortgage was not executed pursuant to the power of attorney. The power was expressly given in order to raise money for *Thompson*, and not for the purpose of securing an old debt.

Wilson, *Chambre*, and *S. Haywood*, *contra*, contended, that as the plaintiffs were in possession of the first bill of lading, which was signed by the defendant, it is conclusive as against him. A bill of lading is as negotiable as a bill of exchange. It is an undertaking by the captain, to deliver the goods specified therein, either to the consignee, or to his assigns. The defendant, therefore, having signed one bill of lading, acted fraudulently in signing another, which was inconsistent with the first. But in every case where there are two inconsistent bills of lading, the first binds the captain and owners. If the other bills of lading had been of the same tenor and date as the first, *Coppell* and *Goldwin* could have derived no title under them, because, in order to negotiate

gotiate them, they ought to have been indorſed by *Fairbrother* as well as *Thompſon.*

Admitting that the defendant is to be conſidered as a truſtee, yet he is truſtee for thoſe perſons to whoſe order he himſelf ſigned the bills of lading; and if, after having ſigned one, he enters into a ſubſequent contract inconſiſtent with ſuch truſt, he is guilty of a breach thereof, for which he is perſonally anſwerable. He is not in a ſimilar ſituation to a ſheriff, who knows not whom to prefer of two contending parties, whoſe ſeveral claims he is not privy to, and therefore comes to the court for an indemnity, or ſeeks it from the parties: for here theſe contradictory claims are ſet up in conſequence of the defendant's own wrong, and could not have happened without. The defendant, therefore, has made himſelf liable.

But even conſidering this merely as a queſtion of right between the plaintiffs and *France* and Company, the plaintiffs title ought to be preferred, becauſe they derive it under the firſt bill of lading.

WILLES, *J.*—Gave no further opinion, but declared himſelf ſatisfied with the verdict.

ASHHURST, *J.*—I do not think, upon the whole of the tranſaction, that this can be conſidered as a verdict either againſt evidence or law, and therefore there ought not to be a new trial.

There is no reaſon for ſaying that either the plaintiffs, or *France* and Company, are not equitable holders of the ſeveral bills of lading. When equity is equal between the parties, a legal title muſt prevail. This reduces the queſtion to a mere point of law. I ſhall put out of the queſtion all the letters, which

ought not to prejudice the plaintiffs, becaufe they were not proved to have had actual notice of them; neither are they guilty of negligence, in not having endeavoured to learn their contents. They knew that *Fairbrother* acted as the agent of *Thompfon*, and had no reafon to be fufpicious of his authority.

Upon the merits of the cafe, the leaning of my inclination would rather be in favour of the defendant, whom I confider as the fervant of *France* and Company, than in favour of the plaintiffs, becaufe they have got another fecurity.

But in point of law alfo the plaintiffs are not entitled to recover. Three bills of lading were figned by the captain. The firft is a general one, configning the whole cargo to the order of *Thompfon* and *Fairbrother*; the other two are partial configuments of different parts of the fame cargo to the order of the fhipper. If it could be proved, or there was any reafon to infer, that the defendant meditated a fraud on any perfon, that would afford an argument as againft him; but no fraud can be prefumed here.

I do not fee, indeed, the reafon of making thefe bills of lading in a different form; but the captain might fuppofe them to be the fame in effect, for he knew that *Fairbrother* was merely an agent for *Thompfon*. Therefore I do not think that they can be faid to be inconfiftent; they are all of them in *fubftance* to the order of the fhipper. Whoever, then, was firft in poffeffion of either of thefe bills of lading, had the legal title vefted in him.

It appeared by the letter of the 18th of *March*, that at that time *Thompfon* had indorfed two of the bills of lading to the agents

of

of *France* and Company. In my opinion, that was an immediate transfer of the legal interest in the cargo; and that same letter, which also conveyed the other bill of lading to *Fairbrother*, gave him notice of this indorsement.

It was argued, that the defendant was bound to deliver the cargo according to his undertaking; but as he knew of this indorsement to *Coppell* and *Goldwin*, he considered himself bound to deliver the cargo according to that bill of lading, which was first possessed by one of the parties. He then concluded, that he should fulfil his undertaking by delivering to the order of the shipper. As to the plaintiffs being in possession of the bill of lading under which they claim, before the other two arrived in *England*, the time of their arrival cannot vary the case, for the legal title was vested in *Coppell* and *Goldwin*, by their being indorsed to them.

Buller, *J.*—Several objections have been made to this verdict, but the case is confined to a very narrow compass.

The first objection was, that the defendant had no right to withold the goods, after demand made by the holder of the bill of lading. The answer given to it was, that he was indemnified, and that it ought to be considered as an action between the plaintiffs and *France* and Company. But I do not think that the doctrine of indemnity applies to such cases as these. Besides, it always applies against a defendant, and not for him. If it appears that a defendant stands in the place of a third person, he shall not be permitted to avail himself of any objection against the merits of the case, which such third person could not have availed himself of.

The

The ſecond objection was, that, as there were different bills of lading, the defendant was bound to deliver the cargo according to the firſt bill of lading actually ſigned.

This being the real point of the caſe, I ſhall reſerve it till laſt.

Third objection. That as the plaintiffs and *France* and Company were *bonâ fide* holders of theſe bills of lading, they who firſt got poſſeſſion, as between theſe parties, were to be preferred.

But bare poſſeſſion conveys no title, as between perſons claiming under different rights. The queſtion here is, who has the *legal* title? For the perſon who firſt gets poſſeſſion, under the legal title, muſt prevail.

4thly, That *France* and Company were not creditors to *Thompſon* at the time that the bills were indorſed to them. But that is not ſo: for they ſtood in the ſituation of payees of the bills of exchange, for which they had given a valuable conſideration.

The laſt objection was, That the plaintiffs were entitled under the covenant contained in the mortgage, to conſign to them.

The anſwer given to that was right: that the mortgage had nothing to do with this queſtion. It was ſubſequent to the tranſaction; and, beſides, it was only a covenant to conſign, which could not bind third perſons.

Now as to the principal point, it is material to conſider the nature of a bill of lading. It is an acknowledgment under the hand of the captain, that he has received ſuch goods, which he undertakes to deliver to the perſon named in that bill of lading. It is aſſignable in its nature; and by indorſement the property is veſted in the aſſignee. It is now clearly ſettled

that goods at ſea may be ſo aſſigned. This doctrine is laid down in *Evans* and *Marlett*, 1 Lord *Raym.* 271. and is recognized by Lord *Mansfield* in *Wright* and another *v. Campbell* and another. 4 *Burr.* 2051.

It is argued that the captain muſt be anſwerable, at all events, in this action, becauſe he ſigned the firſt bill of lading to the order of *Thompſon* and *Fairbrother*, who indorſed it to the plaintiffs.—I think it very material to conſider who *Fairbrother* was. He had no intereſt in theſe goods; and he was known to all the parties, to be the agent of *Thompſon*. Then *Fairbrother* muſt be conſidered as *Thompſon* himſelf. The bills of lading were all to the order of *Thompſon*: he had then the abſolute controul over the goods, and might have unſhipped them if he had ſo pleaſed: ſo that they are not like goods conſigned to a third perſon, for they remained under the power of *Thompſon* all the time, 'till he indorſed the bills of lading. If *Thompſon* and *Fairbrother* are to be conſidered as the ſame perſon, it is the ſame as if the bills of lading were to the order of *Thompſon* alone. Then the queſtion is, who has the prior right under him?

It was ſaid by the plaintiffs counſel, that the defendant was the agent of *France* and Company, and that they muſt be taken to know what he did; but that makes againſt the plaintiffs: for at the time when *Thompſon* aſſigned the two bills of lading to *Coppell* and *Goldwin*, the defendant knew that he had the other in his hands, and could not, therefore, have aſſigned it to any other perſon. The defendant then acted fairly; and it could only happen by the ſubſequent miſconduct of *Thompſon*, namely, by his afterwards indorſing

one

one of the bills of lading to another party, that any difficulty could arife.

Then the queftion is, whether this bill of lading, being made in favour of *Thompfon* and *Fairbrother* jointly, can be diftinguifhed from one made in favor of *Thompfon* only? I think it cannot, becaufe *Fairbrother* is known to the parties to be the agent of *Thompfon*.

As, therefore, this tranfaction is to be confidered in the fame light as if all the bills of lading had been made to the order of *Thompfon* alone, how does the queftion ftand as between the plaintiffs and *France* and Company? Both parties claim under *Thompfon*: but *France* and Company have the firft *legal right*; for two bills of lading are firft indorfed to them, and the letter which conveyed the other bill of lading to *Fairbrother*, apprized him at the fame time of this indorfement.

Rule difcharged.

Smith and another againft Niffen and another. T. 26 Geo. III. Durnford and East I V. 269. Upon a requeft to A. to accept a bill, and draw upon B. for the like fum, the mere act of drawing upon B. does not amount to an acceptance.

This was an action for money paid, laid out, and expended, tried before *Buller*, J. at the fittings after laft *Eafter* term, at *Guildhall*, when a verdict was found for the plaintiffs. The circumftances were thefe.—One *Taubert* fent an order to the defendants for goods, and defired that they would draw a bill on the plaintiffs for the value, which the defendants accordingly did, after they had fent the goods. The plaintiffs, in a letter written to the defendants, on the 23d *September*, faid, that they could not accept the bill on account of *Taubert* at prefent, becaufe they (the defendants) had fent a larger quantity of goods than were ordered; adding, that they had written to *Taubert* for further directions. Two days afterwards the defendants wrote to the pIaintiffs, preffing that the bill might be taken up; and on the 28th

 of

of the ſame month received for anſwer, that the plaintiffs had written to *Taubert*, and were waiting for his anſwer before they could accept; and that they had deſired the holder to keep the bill in the mean time. On the 14th *October*, *Taubert*, in a letter to the plaintiffs, took notice, that the orders had been exceeded, but deſired that they would accept the bill, and draw upon *Govertz*, at *Hamburgh*, for the amount. In conſequence of which, the plaintiffs drew on *Govertz*, who refuſed to accept, and afterwards the plaintiffs paid the bill for the honor of the drawer; to recover back the amount of which, this action was brought.

Wilſon now moved for a rule to ſhew cauſe, why the verdict which had been given for the plaintiffs ſhould not be ſet aſide, and a verdict entered for the defendants, upon the ground that the plaintiffs had actually accepted the bill drawn upon them. He admitted that, notwithſtanding *Taubert*'s letter, the plaintiffs might have choſen whether they would accept or not; but he contended, that they had only a right to draw on *Govertz*, upon condition that they themſelves ſhould accept the bill drawn upon them, and therefore that their drawing upon *Govertz* was an implied acceptance of that bill. But *the court* held, that what the plaintiffs had done did not amount to an acceptance, for they never meant to make themſelves liable, unleſs the bill drawn upon *Govertz* was accepted and paid; and they would not imply a contract which the parties themſelves refuſed to enter into.

Rule refuſed.

EJECTMENT

Doe, on the demise of Warry, and others, against Miller and another, executors of Chambers. M. 27 G. III. B. R. Durnford and East. 1 V. 393. A surrender of chambers in New-Inn to the treasurer and antients of the society, made with their assent, to the intent that they might grant the said chambers to a purchaser, passes the estate to such purchaser before admission. Admission is not necessary, as in the case of copyholds, to complete the grantee's estate, but is only for the purpose of signifying the assent of the society that the grantee should become a member of the inn.

EJECTMENT by the lessors of the plaintiff, who are the treasurer and antients of *New-Inn*, to recover a set of chambers in the inn.

In *February* last, *Richards*, who was tenant for life of the chambers in question, agreed with *J. Chambers* for the sale of his life estate: but there being a clause in *Richards's* grant that he should not sell or assign without the licence of the treasurer and antients of the inn, application was made to them for that purpose; who at a pention held on the 23d of *February*, 1786, ordered "that *Richards* should be at "liberty to surrender his chambers in favor "of *J. Chambers*, for his life, the latter having "agreed to take them for the purpose of "studying the law, and that he (*J. Chambers*) "should be admitted thereto upon the usual "payment, and subject to the usual terms and "conditions." In consequence of this, *Richards* executed a conveyance to *J. Chambers*, by which he surrendered, granted, and yielded up the said chambers, *&c.* and all his estate, right, title, interest, and property therein, to *J. Warry*, the treasurer, and the rest of the antients, to the end, intent, and purpose, that the said treasurer and antients, or their successors, might grant the said chambers and premises, according to the custom of the said society, unto *J. Chambers*, one of the members of the said society, and who had agreed to take the said chambers and premises, for and during the term of his natural life, at and under such yearly rents, provisoes, conditions, and agreements, as they should think fit. *J. Chambers* was to pay 20 l. yearly to the society by quarterly payments, from the *Christmas* preceding. Immediately on the execution of the surrender, he entered into

 possession,

possession, and continued therein till the 28th of *March* last, when he died. There being no meeting of the treasurer and antients between the time of the surrender by *Richards* and the death of *Chambers*, the admission of the latter was not made out by the society, neither did *J. Chambers* pay the alienation fee of five guineas, which is due to the society, on the transfer or sale of chambers. But it was proved at the trial that he might have had his admission if he had applied for it. The surrenders to the society by the tenants for life are always upon the usual stamps used for deeds; and the admissions are entered only in the society books, without any stamp.

On these facts the jury found a verdict for the lessors of the plaintiff.

Richardson, on a former day, had obtained a rule to shew cause why the verdict should not be set aside, and a new trial granted, on the ground that wherever an estate passes by surrender and admission, the latter is absolutely necessary to perfect the conveyance of the estate. And he likened this to the case of copyholds, where admittance is necessary, in order to vest the estate in the surrenderee. *Co. Copyh.* 70. If grantee enter before admittance he is punishable as a trespasser, and if he surrender to the use of another it is void. *Co. Copyh.* 51. *Yelv.* 44. 5. So where surrenderer or surrenderee and the two tenants into whose hands the surrender was made died before the presentment of the surrender, it was held that the heir of the surrenderer might enter. *Co. Copyh.* 69. 3. *Bulst.* 214. *Cro. Jac.* 403. *Bridg.* 52. *Gib. Ten.* 263. 2 *Wils.* 13. It was held that admittance is as necessary to a surrender, as inrollment to a bargain and sale, or livery to

a feoff-

a feoffment. That though, by the cafe of *Vaughan ex dem Atkins* v. *Atkins* (*a*) admiffion, when granted, has relation back to the time of the furrender, yet in this cafe there having in fact been no admiffion, the eftate continued in the furrenderer.

(a) 5 Burr. 2764.

Gibbs was to have fhewn caufe this day againft the rule, but the court being of opinion that the cafes relating to copyholds were not applicable to the prefent, delivered their opinions, without hearing him, to the following effect.

ASHHURST, J.—In whatever light this cafe is confidered, the leffors of the plaintiff are entitled to recover. For if the furrender were not good, fo as to pafs the eftate to the furrenderee, the fociety are entitled to the poffeffion of the chambers as againft the defendants, becaufe they were furrendered into their hands; and the defendants, as executors of the furrenderee, can have no colour of right to them. But if the furrender were good, then the teftator having only a life eftate in them, they reverted of courfe to the fociety upon his death.

This cannot be confidered as a copyhold or cuftomary eftate. For the furrender which is made to them upon every alienation is a mere form introduced for their own convenience, for the purpofe of preventing improper perfons from being admitted into the fociety. Immediately upon this furrender they became truftees for the teftator. The equitable eftate was vefted by that act in him, and the legal eftate in them.

BULLER, J.—There is a manifeft diftinction between this cafe and that of copyholds. In the latter cafe there muft be an admittance as

well as a ſurrender, becauſe admittance is neceſſary to paſs the legal eſtate. But this is a bare truſt. This is not a cuſtomary eſtate; but a freehold intereſt. *New-Inn* is a part of the *Middle-Temple*, who are truſtees for the inn; and the ſociety themſelves are merely truſtees for the perſons holding the chambers. As to the admittance which it has been contended is eſſential to the completion of a purchaſer's title to chambers, that is only an aſſent on the part of the ſociety that the particular perſon ſhould become a member of it. For every perſon, on purchaſing chambers, covenants that he will not aſſign without giving notice to the inn, of the perſon to whom he is about to aſſign, that they may either approve or diſapprove of the intended purchaſer, and that aſſent is written on unſtamped paper, and conveys no title. It is the ſurrender which paſſes the whole intereſt.

Rule diſcharged.

Brock against Richardson. M. 27 G. III. B.R. Durnford and Eaſt. 1 V. 427. If a modus be not proved as laid by the plaintiff in a ſuit in prohibition, there muſt be a verdict for the defendant. But if any modus be found, though different from that laid, that is a ground for the court to refuſe a conſultation.

This was a ſuit in prohibition; and the queſtion was, whether within the chapelry of *Witton Gilbert* there is a modus for every inhabitant to pay three half-pence for every milch-cow *at the time of calving*, in full ſatisfaction for the tithe of calves?

At the trial of this cauſe at the laſt aſſiſes at *Durham*, before *Heath*, J. there was no contrariety of evidence; and the jury found the modus, with this variance, that it was *payable at Eaſter, and that it did not extend to certain lands within the chapelry*, called the *Copſe lands*, conſiſting of five farms, which were exempted from the payment of theſe and all other tithes. Verdict for the plaintiff, with liberty to move to ſet it aſide in this court, without coſts.

Wood

Wood having moved to ſet aſide this verdict, on the ground that, as this was a claim by preſcription, the jury ought to have found the modus as laid in the declaration, or not at all;

Chambre now ſhewed cauſe. The variance between the modus laid and that proved is no ground for a new trial, or to entitle the defendant to a verdict. An iſſue in prohibition to try a particular modus is extremely different from iſſues in other ſuits; for, whether one ſort of modus or another be found, it is equally a reaſon to warrant the prohibition (*a*). The very ground on which a prohibition is prayed for, is a ſuggeſtion that the eccleſiaſtical court is proceeding to try a queſtion of which they have no cognizance. The fact which is tried in ſuits in prohibition is merely for the information of the court. This is in ſome reſpects like an iſſue directed by the court of chancery to try a particular cuſtom, which is merely for the information of the chancellor, and which may be indorſed ſpecially on the *poſtea*, according to the truth of the fact. He was then ſtopped by the court, and

(*a*) Dyer 170, 1. Hob. 192. 1 Ventr. 32.

Buller, J. ſaid it was too clear for any further argument. The authorities cited are directly in point, as far as they go. It appears from them that no conſulation ought to be awarded: but it is equally clear that the verdict muſt be entered for the defendant.

In order to try a particular modus, one party alledges, and the other denies, the exiſtence of it: that is the only iſſue on the record to be tried. As the plaintiff therefore has failed in proving the modus as alledged in pleading, the verdict muſt be entered ſpecially for the defendant, who is entitled to his coſts. But though the modus be not found, as laid, yet

 if

if *any* modus be found, that is a sufficient ground for refusing a consultation.

Per curiam. The verdict must be entered specially for the defendant; and no consultation will be awarded.

Turner v. Winter H. 27 Geo. III. B. R. Durn. and East 1 V. 602. A patent is void if the specification is ambiguous or gives directions which tend to mislead the public. The patent was for producing a yellow colour, for painting in oil or water, and making white lead, and separating the mineral alkali, from common salt, all by one process.

This was an action on the case, brought against the defendant for infringing the plaintiff's patent, which was granted to him for producing a yellow colour, for painting in oil or water, and making white lead, and separating the mineral *alkali* from common salt, all by one process. On the trial before *Buller*, J. at the last sittings at *Westminster*, a verdict was found for the *plaintiff*: and on a motion to set aside that verdict and grant a new trial, these facts were reported. The plaintiff within the usual time had enrolled the following specification *; Take any quantity of lead, and calcine it, or *minium*, or red lead, litharge, lead ash, or any calx, or preparation of lead, fit for the purpose; to any given quantity of the above-mentioned materials, add half the weight of sea-salt, with a sufficient quantity of water to dissolve it, or rock-salt, or sal gem, or fossil-salt, or any marine salt, or salt-water proper for the purpose; mix them together by trituration 'till the lead becomes impalpable, or sufficiently comminuted. When the materials have been ground, let them stand for twenty-four hours, in which time the lead will be changed to a good white, and the salt decompounded; if not, the trituration must be repeated, with the farther addition of salt, 'till the white colour be obtained; the decomposition of the salt may also be brought about by digestion or by calcination. The materials may be suffered to remain together, before the *alkali* is separated by the addition of water,

* Specification.

for

for a longer time than is ſpecified above, according to the diſcretion of the operator, and the end he wiſhes to obtain. The yellow colour is produced by calcining the lead after the alkali has been ſeparated from it 'till it ſhall acquire the colour wanted: this will be of different tints according to the continuance of the calcination, or the degree of heat employed. The white lead muſt be finiſhed by repeated ablutions, and by bleaching it 'till the white be made perfect.

On the part of the plaintiff it was proved, that the firſt effect of the proceſs was the ſeparating of the mineral *alkali* from common ſalt; that that produced white lead, and that by continuing the proceſs to a certain degree, and afterwards expoſing the matter, the yellow colour was produced. That as the ſpecification required the heat to be continued 'till the colour was obtained, any perſon trying the experiment would neceſſarily be led to fuſion. That a chymiſt would ſee by the ſpecification, that if leſs heat would not anſwer the purpoſe, he muſt go on to fuſion. The difference between fuſion and calcination, both of which proceed from different degrees of heat operating upon the ſubject matter, was, that the ſubſtance to be calcined continued in a ſolid form; whereas fuſion is a liquid ſtate to which the ſubſtance may be reduced by continuing the heat. Inſtances were produced by perſons who had made the colour by the help of the ſpecification, after trying ſome experiments. In trying thoſe experiments *minium* had been uſed in the firſt inſtance. The white lead produced by following the directions in the ſpecification was not what was ſold as ſuch; but a white ſubſtance, the baſis of which was lead.

Objections to the specification.

For the defendant it was proved, that the patent colour could not be made by following the directions of the specification. For calcination was not sufficient to produce the effect intended; it was necessary to go on to fusion. That, as it appeared upon the specification, *minium* or red lead might be considered most convenient for the purpose, because a previous process was necessary to reduce lead to *minium* or litharge, before the other parts of the process were to be begun; *minium* and litharge differing only in having undergone different degrees of calcination. But that *minium* would not produce the effect unless first fused. And that if red lead were calcined, the experiment would not succeed without fusion: whereas, according to the terms of the specification, fusion should be cautiously avoided. That the specification was calculated to mislead also with respect to the salts. For *fossil salt* is a generic term, including all mineral salts: but only one species of fossil salt, namely *sal gem*, has marine acid, without which the colour could not be produced. That several persons had tried to make white lead by the specification, but had not succeeded. They could only produce a greyish white powder, quite unfit for painting, and not merchantable.

Objections at the trial.

Mr. J. BULLER,—after reporting these facts, observed, that at the trial three objections had been taken to the specification. 1st, That, after directing that lead should be calcined, it directed another ingredient to be taken, which would not answer the purpose, namely, *minium*. Neither was it said that the *minium* should be calcined or fused: but if it had any reference to the preceding words, then it should be calcined, which would not produce the effect, fusion

fusion being neceſſary. 2dly, That " foſſil " ſalt" was improperly mentioned. There were many kinds of foſſil ſalt, only one of which, namely, "*ſal gem*," would anſwer the purpoſe; becauſe it muſt be a *marine ſalt*. 3dly, That all theſe things put together did not produce the thing intended. And that the patent was for an invention to do three things in one proceſs, whereas one of them, namely, white lead, could not be produced at all; for that a white ſubſtance like lead remained, applicable only to ſome of the purpoſes of common white lead. The learned judge then ſaid that at the trial he had told the jury, that if either of theſe objections were well founded, it would avoid the patent.

Erſkine and *Piggott* ſhewed cauſe againſt the rule for granting a new trial, and contended, that in actions for infringing patents, it is not neceſſary for the plaintiff to give any evidence to ſhew what the invention is, but that it is incumbent on the defendant, if he objects to the ſpecification, to ſhew that it is defective; and that perſons acquainted with the ſubject, could not by the aſſiſtance of the ſpecification, effect the thing intended. The conſideration, which the patentee gives for his monopoly, is the benefit which the public are to derive from his invention, after his patent is expired; and that benefit is ſecured to them by means of a ſpecification of the invention. But it is not neceſſary that that ſpecification ſhould be ſuch, as that perſons unacquainted with the terms of art, which muſt neceſſarily be uſed in writing it, ſhould be able to underſtand it. [illegible]s ſufficient if perſons of ſkill can underſtand the proceſs, by means of the ſpecification,

tion, fo as to keep alive the difcovery, after the patentee's exclufive title is expired.

The firft objection which has been raifed againft the fufficiency of this fpecification has no weight: for though the direction to calcine is applicable to all the ingredients in the firft part of the defcription, yet fcientific perfons would inftantly difcover what degree of heat was neceffary to be ufed to each of thofe ingredients; and that *minium*, being already a calx, muft be fufed. 2dly, The heat is ordered to be continued 'till the experiment fucceeds, and the colour is produced. Fufion is a neceffary confequence of continuing the heat; and this direction would be fufficiently underftood by all perfons acquainted with the fubject.

As to the fecond objection, with refpect to the "foffil falt," the fpecification begins with "fea falt," which is the genus: then it afterwards ftates not "*any* foffil falt;" but "foffil "falt," or "*any marine* falt;" the "*marine* "*falt*" is therefore the bafis of the experiment; fo that no *foffil falt* but what is likewife a *marine falt*, can be taken under this defcription.

The anfwer to the third objection is, that a fpecies of white lead is produced, though not the common cerufe; and the patent does not profefs to make the common white lead. Befides the making of white lead was not the fubject of the prefent action, which was for making the yellow colour, which accounts for the plaintiff's not being prepared to prove this part of the fpecification. Upon the whole, this was a mere matter of evidence, as to the fufficiency of the fpecification, upon which the jury have exercifed a found difcretion.

Bearcroft.

Bearcroft, in ſupport of the rule, was ſtopped by the court.

Ashhurst, J.—I think that, as every patent is calculated to give a monopoly to the patentee, it is ſo far againſt the principles of law, and would be a reaſon againſt it, were it not for the advantages which the public derive from the communication of the invention, after the expiration of the time for which the patent is granted. It is therefore incumbent on the patentee to give a ſpecification of the invention in the cleareſt and moſt unequivocal terms of which the ſubject is capable. And if it appear that there is any unneceſſary ambiguity affectedly introduced into the ſpecification, or any thing which tends to miſlead the public, in that caſe the patent is void. Here it does appear to me, that there is at leaſt ſuch a doubt on the evidence, that I cannot ſay this matter has been ſo fully and fairly examined as to preclude any farther inveſtigation of the ſubject. Three objections have been made to this ſpecification. The firſt is, that in the ſpecification the public are directed "to take "any quantity of lead, and calcine it, or "*minium*, or red lead;" from whence it is inferred that *calcining* is only to be applied to *lead:* I confeſs if the objection had reſted here, I ſhould have entertained ſome doubt.

The next objection is, that in the ſubſequent materials to be added, the public are directed to add "half the weight of ſea ſalt, "or ſal gem, or foſſil ſalt, or any marine ſalt." Now "foſſil ſalt" is a generic term, "including ſal gem" as well as other ſpecies of foſſil ſalt. And I underſtand that ſal gem is the only one which can be applied to this purpoſe; ſo that throwing in *foſſil ſalt* can only

be

be calculated to raiſe doubts and miſlead the public. That word could not have been added with any good view: it muſt produce many unneceſſary experiments; therefore in that reſpect the ſpecification is not ſo accurate as it ought to have been. Another objection was taken as to the white lead; to which it was anſwered, that the invention did not profeſs to make common white lead. But that is no anſwer: for if the patentee had intended to produce ſomething only like white lead, or anſwering ſome of the purpoſes of common white lead, it ſhould have been ſo expreſſed in the ſpecification. But in truth the patent is for making white lead and two other things by one proceſs. Therefore if the proceſs, as directed by the ſpecification, does not produce that which the patent profeſſes to do, the patent itſelf is void. It is certainly of conſequence that the terms of a ſpecification ſhould expreſs the invention in the cleareſt and moſt explicit manner; ſo that a man of ſcience may be able to produce the thing intended, without the neceſſity of trying experiments.

BULLER, J.—Many caſes upon patents have ariſen within our memory, moſt of which have been decided againſt the patentees, upon the ground of their not having made a full and fair diſcovery of their inventions. Wherever it appears that the patentee has made a fair diſcloſure, I have always had a ſtrong bias in his favour, becauſe in that caſe he is intitled to the protection which the law gives him. How far that law, which authoriſes the king to grant patents, is politic, is not for us to determine. When attempts are made to evade a fair patent, I am ſtrongly inclined in favour of the patentee; but where the diſcovery

is not fully made, the court ought to look with a very watchful eye, to prevent any imposition on the public. Then the queſtion is, whether the preſent plaintiff has made a fair diſcovery? I do not agree with the counſel, who have argued againſt the rule, in ſaying, that it was not neceſſary for the plaintiff to give any evidence to ſhew what the invention was, and that the proof that the ſpecification was improper lay on the defendant; for I hold that a plaintiff muſt give ſome evidence to ſhew what his invention was, unleſs the other ſide admit that it has been tried and ſucceeds. But wherever the patentee brings an action on his patent, if the novelty or effect of the invention be diſputed, he muſt ſhew in what his invention conſiſts, and that he produced the effect propoſed by the patent in the manner ſpecified. Slight evidence of this on his part is ſufficient, and it is then incumbent on the defendant to falſify the ſpecification. Now in this caſe no evidence was offered by the plaintiff to ſhew that he had ever made uſe of the ſeveral different ingredients mentioned in the ſpecification; as for inſtance, *minium*, which he had nevertheleſs inſerted in the patent; nor did he give any evidence to ſhew *how* the yellow colour was produced. If he could only make it with two or three of the ingredients ſpecified, and he has inſerted others which will not anſwer the purpoſe, that will avoid the patent. So if he make the article, for which the patent is granted, with cheaper materials than thoſe which he has enumerated, though the latter will anſwer the purpoſe equally well, the patent is void, becauſe he does not put the public in poſſeſſion of his invention,

invention, or enable them to derive the ſame benefit which he himſelf does.

As to the firſt objection which has been taken with reſpect to the *minium:* it was not pretended, by any of the plaintiff's witneſſes, that he ever made uſe of *minium.* And it was proved by the defendants witneſſes, that from the ſpecification they ſhould be led to uſe *minium,* becauſe *minium* is lead already calcined, which is what the ſpecification directs in the firſt inſtance. But *minium* will not anſwer the purpoſe. Then as to fuſion: it is ſaid that the public are directed, by the words of the ſpecification, to continue the heat till the effect is produced; which muſt neceſſarily lead to fuſion, though fuſion is not expreſsly mentioned. But that is no anſwer to the objection: for the ſpecification ſhould have ſhewn by what degree of heat the effect was to be produced. Now it does not mention fuſion; and, as one of the witneſſes ſaid, in order to produce the effect, " you muſt go out of the " patent;" for fuſion is beyond calcination, and in ſome ſenſe contrary to it; and, by mentioning calcination, it ſhould ſeem that fuſion was to be avoided.

The next objection was as to the ſalts. " Foſſil ſalt" is mentioned, as a diſtinct ſpecies of ſalt, and many other ſalts are alſo mentioned, as indifferent whether one or the other be uſed. But it was proved that foſſil ſalt was a generic term, including ſeveral ſpecies; and that "*ſal gem*" was the only ſpecies of it which would anſwer the purpoſe; becauſe none of the others contained a marine acid, which was eſſential.

There was no contradiction by the witneſſes on the third objection: for the moſt that the

plaintiff's

plaintiff's witnesses said, was, that, following the specification, the experiment only produced a white substance like lead.

Now, on either of these grounds, the patent is void. Because if the patentee says, that by one process he can produce *three* things, and he fails in any one, the consideration of his merit, and for which the patent was granted, fails, and the crown has been deceived in the grant. Slight defects in the specification will be sufficient to vacate the patent. In a case before Lord *Mansfield*, for infringing a patent for steel trusses, it appeared that the patentee, in tempering the steel, rubbed it with tallow, which was of some use in the operation; and, because this was omitted, the specification was held to be insufficient, and the patent was avoided.

Rule absolute.

Goodall and others against Dolley, E. 27 G. III. B. R. Durnford and East, 1 V. 712. If the indorsee of an inland bill, not due, present it for acceptance, which is refused, and delay giving notice to his indorser, the indorser will be discharged. And a subsequent proposal by the indorser, to pay the bill by instalments, made without knowledge of the indorsee's laches, is not a waiver of the want of notice.

This was an action by the indorsee of a bill of exchange against the indorser, tried before *Heath*, Justice, at the last assises at *Warwick*. The bill, which was dated on the 4th of *November*, 1786, was drawn by one *Lutwych*, on *John Rutter*, in favour of the defendant, and payable sixty-five days after date. The defendant indorsed it to the plaintiffs. The bill was tendered for acceptance by the plaintiffs to *Rutter*, on the 8th of *November*, who refused to accept it. The first advice given of this refusal by the plaintiffs to the defendant was by a letter, dated the 6th of *January* following, which only mentioned generally the return of the bill, without specifying the time or circumstance of the tender of the bill to *Rutter*, and his refusal. The bill expired on the 11th of *January*, and, on the next day, the defendant made a proposal to one of the plain-

 tiffs,

tiffs, to pay the bill by inſtalments. *Heath*, Juſtice, was of opinion, that as this propoſal was made under an ignorance of all the circumſtances of the caſe, which it was material for the defendant to know, he was diſcharged by the laches of the plaintiffs; and, in conſequence of that direction, the jury found a verdict for the defendant.

A motion was made by *Lee* for a new trial, on two grounds. Firſt, that as notice in this caſe could not have been of any ſervice to the defendant, in as much as *Rutter* was inſolvent when the bill was refuſed acceptance, it was not neceſſary to give notice before the bill became due, and the indorſer ſtill continued liable. Secondly, ſuppoſing he might once have taken advantage of the plaintiffs laches, yet he had waived that advantage by his ſubſequent promiſe.

Balguy ſhewed cauſe. As to the firſt point, it is perfectly clear that the plaintiffs, if they meant to reſort to the defendant, ſhould have given immediate notice to him of the bill's being diſhonoured; inſtead of which, they ſuffered a long ſpace of time to elapſe, by which neglect they have diſcharged the defendant. As to the other point; the defendant cannot be ſaid to have made himſelf liable by his ſubſequent conduct: for, if that were ſo, the ſame reaſoning would have governed the caſe of *Bleſard* and *Hirſt* (*a*), where there was an *abſolute promiſe* to pay. That, therefore, was much ſtronger than the preſent; for here the party did not abſolutely ſay that he would pay the bill; but, under an ignorance of all the circumſtances, he propoſed to pay it by inſtalments. This then, at moſt, was only a *conditional offer*, and, not being accepted,

(*a*) 5 Burr. 2670.

cepted, was the ſame as if it never had been made.

Lee and *Dayrell* in ſupport of the rule. The caſe of *Bleſard* and *Hirſt* was materially different from the preſent; for the ground of that deciſion was, that, if notice had been given, it would have been extremely material, as the drawer continued in credit for three weeks after the bill had been diſhonoured. But here it was utterly impoſſible that notice could have been of any ſervice whatever; for the defendant being the only indorſer, could not have reſorted to the drawer; for, in truth, he became inſolvent immediately after the bill was tendered for acceptance. But ſuppoſing the neglect of the plaintiff had at one time diſcharged the defendant from payment, yet he made himſelf ſubſequently liable, by his offer to pay. And no argument can be drawn from the ſilence of the court in *Bleſard* and *Hirſt*, for that point was never mentioned even in argument; but if it had been urged, it would have been deciſive in favour of the plaintiff.

The plaintiff's counſel alſo offered to procure an affidavit, that the drawee had no effects of the drawer in his hands at the time. But as to this, the court were of opinion, that, as between theſe parties, that would make no difference.

Ashhurst, *J.*—The caſe of *Bleſard* v. *Hirſt* goes the whole length of deciding the preſent. It was there determined, that though it was not neceſſary that the holder ſhould preſent the bill for acceptance before it became due, yet if he does, he muſt give immediate notice to the perſon from whom he received the bill, in caſe it is diſhonoured.

 Here

Here ſuch notice was not given, and therefore the defendant was diſcharged. But then it is ſaid, that he made himſelf ſubſequently liable, by his propoſal to pay the bill by inſtalments, which amounted to an acknowledgment of the debt. That argument might as well have been urged in the caſe of *Bleſard* v. *Hirſt* as the preſent, if it had been thought material: for there the indorſer *abſolutely promiſed* to pay the bill on his return from *Leeds*, but, on his being appriſed that he was not bound by law, he refuſed; and yet that was not held as a waiver of the want of notice. That, indeed, was a ſtronger caſe than the preſent; for here the defendant only made a *conditional offer* to pay by inſtalments, which being rejected, put matters in the ſame ſituation as if no offer had been made. The defendant then had a right to ſtand on the ſtrict rule of law, and by law he is not bound to pay.

BULLER, *J.*—It is rather extraordinary, that in the caſe of *Bleſard* v. *Hirſt*, it ſhould have been made a doubt whether notice of non-acceptance in the caſe of an inland bill of exchange, was neceſſary to be given to the drawer: for it had long been ſettled, that notice was neceſſary to be given in the caſe of foreign bills. But no mention is there made of the want of notice being waived by a ſubſequent promiſe; and that was a much ſtronger caſe than the preſent: for there there was an *expreſs promiſe* to pay by the indorſer; but, in this caſe, there was only a *conditional promiſe*, which was made by the defendant under a total ignorance of all the circumſtances relative to the bill having been diſhonoured. All this is an anſwer to an action againſt the indorſer. But if the

action

action had been brought againſt the drawer, I ſhould have been willing to let in the affidavit, to ſhew that the drawer had no effects in the hands of the drawee. That would be like the caſe of *Bickerdike* v. *Bollman* (a). If *A.* draw on *B.* it muſt be taken *primâ facie* that he has effects in his hands; otherwiſe he has no right to draw on him. But if the drawer has no effects in the hands of the drawee, he cannot be injured by want of notice that the drawee will not pay.

(a) Durnford and Eaſt, 1 V. 405.

GROSE, *J.*—If there be any difference between the caſe of *Bleſard* v. *Hirſt* and the preſent, it is in favour of this defendant: for, at the moſt, this was only a *conditional offer* to pay, but that was a *poſitive promiſe* by the defendant, to take up the bill as he returned from *Leeds*. That caſe, therefore, being preciſely in point, muſt govern the preſent.

Rule diſcharged.

VI. For Excessive Damages.

Vide ante Essay IV. Wheeler v. Honour.

Wood and Gunston, M. 1655, Banc. sup. Sty. 466. For a new trial in an action of trespass for words. Vide ante No. IV. Bright v. Eynon.

Wood brought an action upon the case against *Gunston*, for speaking of scandalous words of him, and, amongst other words, for calling him TRAYTOR, and obtained a verdict against him at the bar, wherein the jury gave 1500 l. damages. Upon the supposition that the damages were excessive, and that the jury did favour the plaintiff, the defendant moved for a new trial. But Serjeant *Maynard* opposed it, and said, that after a verdict the partiality of the jury ought not to be questioned, nor is there any precedent for it in our books of the law, and it would be of dangerous consequence if it should be suffered, and the greatness of the damages given can be no cause for a new trial; but if it were, the damages are not here excessive, if the words spoken be well considered, for they tend to take away the plaintiff's estate and his life. *Windham*, on the other side, pressed for a trial, and said it was a packed business, else there could not have been so great damages; and the court hath power in extraordinary cases, such as this is, to grant a new trial.

Discretion of the court. Discretion judicial, not arbitrary. The court not to be intended partial.

GLYN, *Chief Justice*.—It is in the discretion of the court in some cases to grant a new trial, but this must be a judicial, and not an arbitrary discretion; and it is frequent in our books for the court to take notice of miscar-

riages

riages of juries, and to grant new trials upon them, and it is for the people's benefit that it ſhould be ſo: for a jury may ſometimes, by indirect dealings, be moved to ſide with one party, and not to be indifferent betwixt them; but it cannot be ſo intended of the court: *where-fore let there be a new trial the next term, and the defendant ſhall pay full coſts*, and judgment to be upon this verdict, to ſtand for ſecurity to pay what ſhall be recovered upon the next verdict.

Vide obſervations upon this caſe in Roe v. Hawkes, poſt. and in 1 Sid. 131, 132. Mod. 251, and Beardmore's caſe poſt.

In *Styles*, fo. 462, is the following note in the ſame cauſe.

Upon a motion for a new trial between *Wood* and *Gunſton*, upon a ſuppoſition of exceſſive damages given by the jury, in an action upon the caſe, tried at the bar for words, *viz.* calling the plaintiff *traytor*, *&c.* 1500l. being the damage given, it was ſaid by GLYN, *Chief Juſtice*, that if the court do believe that the jury gave their verdict againſt their direction, given unto them, the court may grant a new trial. *And a new trial was granted in this caſe, after a full debate had by counſel on both ſides.*

Mich. 1655. Memorandum. New trial for miſcarriage of the jury.

In an action upon the caſe by an officer of the cuſtom-houſe at *Portſmouth*, becauſe the defendant ſaid of him, *he ſet his hand to the petition to bring the king to juſtice.* After verdict for the plaintiff, a new trial was moved for, on account of exceſſive damages, which were 700l. and *Wood* and *Guſton*'s caſe, *Style*'s *Rep.* was cited. But to this it was anſwered by *Twiſden*, that the new trial in *Wood* and *Gunſton*'s caſe, was not granted merely for the exceſſiveneſs of the damages, but becauſe tampering with the jury was proved. Q. It was moved that the attorney for the plaintiff ſaid before the trial, that the jury were their

Roe v. Hawkes, E. 15 Car. II. B. R. 1 Lev. 97. New trial not granted for exceſſive damages, nor for words ſpoken by the ſucceſsful party's attorney, that the jury were their friends, &c.

Vide ante.

 friends,

friends, and underſtood their buſineſs, and, they would do well enough. But by WINDHAM, J. If expreſs embracery of the jury be not proved, the words of the attorney ſhall not prejudice the cauſe of his client, and if the damages are exceſſive, attaint lies; and a new trial was denied.

The Lord Townſhend v. Dr. Hughes, M. 28 and 29 C. II. C. B. 2 Mod. 150. No new trial in an action of ſcandalum magnatum. Mod. Rep. 232.

The plaintiff brought an action of *ſcandalum magnatum*, for theſe words ſpoken of him by the defendant, *viz. He is an unworthy man, and acts againſt law and reaſon.* Upon not guilty pleaded, the caſe was tried, and the jury gave the plaintiff 4000 l. damages.

The defendant, before the trial, made all poſſible ſubmiſſion to my lord: he denied the ſpeaking the words, and made oath that he never ſpoke the ſame; after the trial he likewiſe applied to my lord as before, making ſeveral proteſtations of his innocence: but having once in a paſſion ſaid, that he ſcorned to ſubmit, my lord, for that reaſon, would not remit the damages; it was therefore moved for a new trial upon theſe reaſons:

1. Becauſe the witneſſes who proved the words, were not perſons of credit, and that, at the time when they were alledged to be ſpoken, many clergymen were in company with the defendant, and heard no ſuch words ſpoken.

2. It was ſworn that one of the jury confeſſed, that they gave ſuch great damages to the plaintiff (not that he was damnified ſo much) but that he might have the greater opportunity to ſhew himſelf noble in the remitting of them.

3. And which was the *principal* reaſon, becauſe the *damages* were *exceſſive.*

The

The court delivered their opinions *seriatim*; and first, Curia

The Chief Juſtice *North* ſaid: In caſes of fines for criminal matters, a man is to be fined by *Magna Charta*, with a *ſalvo contenemento ſuo*; and no fine is to be impoſed greater than he is able to pay; but, in civil actions, the plaintiff is to recover by way of compenſation for the damages he hath ſuſtained, and the jury are the proper judges thereof.

This is a civil action, brought by the plaintiff for words ſpoken of him, which, if they are in their own nature actionable, the jury ought to conſider the damage which the party may ſuſtain; but if a particular averment of ſpecial damages makes them actionable, then the jury are only to conſider ſuch damages as are already ſuſtained, and not ſuch as may happen *in futuro*, becauſe for ſuch the plaintiff may have a new action. He ſaid, that, as a judge, he could not tell what value to ſet upon the honour of the plaintiff; the jury have given 4000 l. and therefore he could neither leſſen the ſum, or grant a new trial, eſpecially ſince by the law, the jury are judges of the damages; and it would be very inconvenient to examine upon what account they gave their verdict, they having found the defendant guilty, did believe the witneſſes, and he could not now make a doubt of their credibility.

Wyndham, Juſtice, accorded *in omnibus*.

Atkins, Juſtice, *contra*. That a new trial ſhould be granted, for 'tis every day's practice; and he remembered the caſe of *Gouldſton* and *Wood*, in the King's-bench, where the plaintiff, in an action on the caſe for words, for calling of him *bankrupt*, recovered 1500 l. and

Wood and Gunſton. Vide ante.

and that court granted a new trial, becaufe the damages were exceffive.

The jury, in this cafe, ought to have refpect only to the damage which the plaintiff fuftained, and not to do an unaccountable thing, that he might have an opportunity to fhew himfelf generous; and as the court ought with one eye to look upon the verdict, fo with the other they ought to take notice what is contained in the declaration, and then to confider whether the words and damages bear any proportion; if not, then the court ought to lay their hands upon the verdict: 'tis true, they cannot leffen the damages, but if they are too great, the court may grant a new trial.

Scroggs, Juftice, accorded with *North* and *Wyndham*, that no new trial can be granted in this caufe. He faid, that he was of counfel with the plaintiff, before he was called to the bench, and might, therefore, be fuppofed to give judgment in favour of his former client, being prepoffeffed in the caufe, or elfe (to fhew himfelf more fignally juft) might, without confidering the matter, give judgment againft him: but that now he had forgot all former relation thereunto, and therefore delivered his opinion, that, if he had been of the jury, he fhould not have given fuch a verdict; and, if he had been plaintiff, he would not take advantage of it, but would overcome with forgivenefs fuch follies and indifcretions of which the defendant had been guilty; but that he did not fit there to give advice, but to do juftice to the people. He did agree that where an unequal trial was, (as fuch muft be where there is any practice with the jury,) in fuch cafe 'tis good reafon to grant a new trial;

trial; but no ſuch thing appearing to him in this caſe, a new trial could not be granted.

Suppoſe the jury had given a ſcandalous verdict for the plaintiff, as a penny damages, he could not have obtained a new trial, in hopes to increaſe them; neither ſhall the defendant, in hopes to leſſen them: and therefore, by the opinion of theſe three juſtices, a new trial was not granted.

Afterwards in this term, Serjeant *Maynard* moved in arreſt of judgment, and ſaid, that this action was grounded upon the ſtatute of *R. II.* which conſiſts of a preamble, reciting the miſchief, and of the enacting part, in giving of a remedy; and that the defendant's caſe was neither within the miſchief or the remedy.

This ſtatute doth not create any action by way of particular deſign; and if the matter was now *res integra*, much might be ſaid that an action for damages will not lie upon this ſtatute; for the ſtatute of *Weſtm.* 2. appoints that the offender ſhall ſuffer impriſonment, until he produces the author of a falſe report; and the ſtatute of 2 *R. II.* which recites that of *Weſtm.* 2. gives the ſame puniſhment, and the action is brought *qui tam*, *&c.* and yet the plaintiff only recovers for himſelf. It was uſual to puniſh offenders of this kind in the *Star Chamber*; as in the Earl of *Northampton*'s caſe, where one *Goodricke* ſaid of him, *That he wrote a book againſt Garnet, and a letter to Bellarmine*; intimating, that what he wrote in the book was not his opinion, but only *ad captandum populum*, which was a great diſgrace to him in thoſe days, being as much as to ſay he was a papiſt. *Cro. Eliz.*

Ca. 38.

12 Co. 132.

But

But the Serjeant would not inſiſt upon that now, ſince it hath been ruled, that where a ſtatute prohibits the doing of a thing, which, if done, might be prejudicial to another, in ſuch caſe he may have an action upon that very ſtatute for his damages.

But the ground on which he argued was, that theſe words, as ſpoken, are not within the meaning of the act, for they are not actionable.

1. Becauſe they are no ſcandal; and words which are actionable muſt import a great ſcandal, which no circumſtance or occaſion of ſpeaking can excuſe; and if they are ſcandalous, and capable of any mitigation by the precedent diſcourſe, the pleading of that matter will make them not actionable; and for this the Lord *Cromwell*'s caſe is a plain authority. The words ſpoken of him were, *You like thoſe that maintain ſedition againſt the King's perſon*; the occaſion of ſpeaking of which was, to give an account of his favouring the Puritan preachers, which was all that was intended by the former diſcourſe; for that Lord had approved a ſermon which was preached by a parſon againſt the *Common Prayer Book*; and the defendant having forbid ſuch preaching, the Lord told him *that he did not like him*, upon which he ſpoke thoſe words: ſo that the ſubject matter explained the ſenſe, for which reaſon it was adjudged that the action would not lie.

4 Co. 13.

2. The ſcandal for which an action may be brought within this ſtatute muſt be *falſe*, for that word goes quite through the whole act, *viz. falſe news, falſe lies, &c.* and the words here are ſo general, that it cannot appear whether they are true or falſe, for there

Can-

can be no juſtification here, as in caſe where a man is charged with a particular crime; my Lord *Townſhend* is not charged with any particular act of injuſtice as a ſubject, nor with any miſdemeanor as a peer, nor with any offence in an office.

If, therefore, in all actions brought upon this ſtatute, the defendant may juſtify, and put the matter in iſſue, to try whether it be true or falſe, and in this caſe the defendant can neither juſtify nor traverſe; for this reaſon the action will not lie.

That the words are general, and of a doubtful ſignification, it cannot be denied; for to ſay, *He is an unworthy man*, imports no particular crime. *Unworthy* is a term of relation, as he is unworthy of my friendſhip, acquaintance or kindred, and ſo may be applicable to any thing; and a lord may in many things be unworthy of a particular man's friendſhip; as if he promiſes to pay a ſum of money at a day certain, and faileth in the payment, (as 'tis often ſeen,) ſuch is an unworthy man; but that will not bear an action. He is an unworthy man who invites another to dinner to affront him; but it will not bear an action to ſay, *That a lord invited me to a dinner to abuſe me*; neither will it be actionable to ſay, *He is an unworthy man*, becauſe ſuch inſtances may be given of his unworthineſs, which will not bear an action. If my Lord had been compared to any baſe and unworthy thing, theſe words might have been actionable; and that was the caſe of the Lord Marquis of *Dorcheſter*, it being ſaid of him, *That there was no more value in him than in a dog.*

Then to ſay, *a man acts againſt law*, this is no ſcandal; becauſe every man who breaks a

penal

penal law, and suffers the penalty, is not guilty of any crime. The statute commands the burying in woollen, the party buries one of his family in linen; in this he acts against the law, but if the penalty is satisfied, the law is so likewise.

A man who acts against law acts against reason, because *Lex est summa ratio*; but no instance is here given wherein he did thus act. 'Tis not said that he did act against law wilfully, or that he used to do any thing against law; and so cannot be like the case of the Duke of *Buckingham*, who brought an action for these words, *viz. You are used to do things against law, and put cattle into a castle, where they cannot be replevied*; for there was not only an usage charged upon him, but a particular instance of oppression.

This action lies for words spoken of a judge of either bench, and of a bishop, as well as a peer. Now if a man should say, *A judge acted against law*, will an action lie? Because a judge may do a thing against law, and yet very justly and honestly, unless all the judges were infallible, and could not be subject to any mistakes, which none will deny.

So if a bishop return the cause of his refusal to admit a clerk *quia criminosus*, this is a return against law, because 'tis too general; but if *J. S.* should say, *a bishop acted against law, and shewed that for cause*, an action would not lie. If the Lord *Townshend* had commanded his bailiff to make a distress without cause, that had been acting against law and reason.

He agreed the words to be uncivil, but not actionable; for if such construction should be made, a man must talk in print, or otherwise

not

not ſpeak any thing of a peer, for fear of an action.

There are many authorities where a peer ſhall not have an action, for every trivial and ſlight expreſſion ſpoken of him.

As to ſay of a peer, *He keeps none but rogues, and raſcals about him, like himſelf*; by the opinion of two Juſtices, *Yelverton* and *Fleming*, the action would not lie, becauſe they are words of ſcolding, and this was the caſe of the Earl of *Lincoln*, *Cro. Jac.* 196. But the court was divided, the defendant died, and ſo the writ abated.

Actions for words have been of late too much extended; formerly there were not above two or three brought in many years; and if this ſtatute ſhould be much enlarged, the lords themſelves will be prejudiced thereby, by maintaining actions one againſt another.

Upon this ſtatute of 2 *R. II. c.* 5. there was no action brought till 13 *H. VII.* which was above an hundred years after the making of that law; and the occaſion of making the law was, becauſe the Duke of *Lancaſter*, who was then the firſt prince of the blood, took notice that divers were ſo hardy as to ſpeak of him ſeveral lying words, 1 *R. II. num.* 56. and therefore this ſtatute was made to puniſh thoſe who deviſed *falſe news, and horrible and falſe lies of any peer, &c.* whereby diſcords might ariſe between the Lords and Commons, and great peril and miſchief to the realm, and quick ſubverſion thereof. Now from the natural intent and conſtruction of theſe words in the act, can it be ſuppoſed that if one ſhould ſay, *Such a peer is an unworthy man*, that the kingdom would be preſently in a flame, and turned into a ſtate of confuſion and civil war;

and

and to ſay, *That he acts againſt law*, that the government would thereby be in danger to be loſt, and quick ſubverſion would follow? This cannot be the common and ordinary underſtanding of theſe words.

If, therefore, the plaintiff by ſpeaking theſe words was in no hazard, nor anywiſe damnified; if he was not touched in his loyalty as a peer, nor in danger of his life as a ſubject; if he was not thereby ſubjected to any corporal or pecuniary puniſhment; nor charged with any breach of oath, nor with a particular miſcarriage in any office; if the words are ſo general that they import no ſcandal, and are not capable of any juſtification; and laſtly, if they are not ſuch horrible lies as are intended to be puniſhed by the ſtatute; for theſe reaſons he concluded the action would not lie, and therefore prayed that the judgment might be arreſted.

Serjeant *Baldwin* and Serjeant *Barrel* argued on the ſame ſide for the defendant, but nothing was mentioned by them which is not fully inſiſted on in the argument of Serjeant *Maynard*, for which reaſon I have not reported their arguments.

Ex parte quer.

But *Pemberton*, ſerjeant, who argued for the plaintiff, ſaid, that it would conduce much to the underſtanding of the ſtatute of 2 *R. II. cap.* 5. upon which this action of *ſcandalum magnatum* was grounded, to conſider the occaſion of the making of it.

In thoſe days the *Engliſh* were quite of another nature and genius from what they are at this time; the conſtitution of this kingdom was then martial and given to arms, the very tenures were military, and ſo were the ſervices, as knight's ſervice, caſtle-guard, and eſcuage

There

There were many castles of defence in those days in the hands of private men; their sports and pastimes were such as tilts and tournaments, and all their employments were tending to breed them up in chivalry.

Those who had any dependency upon noblemen were inured to bows and arrows, and to signalize themselves in valour it was the only way to riches and honour. Arts and sciences had not got such ground in the kingdom as now; but the commons had almost their dependence upon the lords, whose power then was exceeding great, and their practices were conformable to their power; and this is the true reason why so few actions were formerly brought for scandal, because when a man was injured by words, he carved out his own remedy by his sword.

There are many statutes made against riding privately armed, which men used in those days, to repair themselves of any injury done unto them, for they had immediately recourse to their arms for that purpose, and seldom or never used to bring any actions for damages.

This was their revenge; and having thus made themselves judges in their own cases, it was reasonable that they should do themselves justice with their own weapons; but this revenge did not usually end in private quarrels, they took parties, engaged their friends, their tenants, and servants on their sides, and by such means made great factions in the commonwealth, by reason whereof the whole kingdom was often in a flame, and the government as often in danger of being subverted; so that laws were then made against wearing liveries or badges, and against riding armed.

 This

This was the miſchief of thoſe times; to prevent which this ſtatute of *R. II.* was made, and therefore all provoking and vilifying words which were uſed before to exaſperate the peers, and to make them betake themſelves to arms, by the intent of this act are clearly forbidden, which was made chiefly to prevent ſuch conſequences; for it was to no purpoſe to make a law, and thereby to give a peer an action for ſuch words as a common perſon might have before the making of the ſtatute, and for which the peer himſelf had a remedy alſo at the common law, and therefore needed not the help of this act.

If then the deſign of this ſtatute was to hinder ſuch practices as aforeſaid, the next thing to be conſidered is, what was uſual in thoſe days to raiſe the paſſions of peers to that degree, and that will appear to be, not only ſuch things as imported a great ſcandal in themſelves, or ſuch for which an action lay at the common law, but even ſuch things as ſavoured of any contempt of their perſons; and ſuch as brought them into diſgrace with the commons, for hereby they took occaſion of provocation and revenge.

'Tis true that very few actions were brought upon this ſtatute in ſome conſiderable time after it was made; for though ſuch practices were thereby prohibited, the lords did not preſently apply themſelves to the remedy therein given, but continued the military way of revenge to which they had been accuſtomed.

As to the firſt objection that hath been made, he gave no anſwer to it, becauſe it was not much inſiſted upon on the other ſide, whether an action would lie upon this ſtatute, for the very words of it are ſufficient ground for an action;

action; and 'tis very well known that wherever an act prohibits an evil thing, the person against whom such thing is done, may maintain an action.

Maxim.

This statute consists of two parts, the first is prohibitory, *viz. That no man shall do so, &c.* Then comes the additional clause, and saith, *That if he do he shall incur such penalty.* 'Tis on the first part that this action is grounded; and so it was in the earl of *Northampton's case*, in that report which goes under the name of Lord *Coke's* 12th report, where by the resolution of all the judges in *England*, except *Flemming*, who was absent, it was adjudged that it was not necessary that any particular crime should be fixed on the plaintiff, or any offence for which he might be indicted.

Vide ante.

So are the authorities in all the cases relating to this action. In the Lord * *Cromwell's* case, for these words, *You like those who maintain sedition.* In the Lord of *Lincoln's* case, *My lord is a base earl, and a paltry lord, and keepeth none but rogues and rascals like himself.* In the Duke of *Buckingham's* case, *He has no more conscience than a dog.* In the Lord † Marquis of *Dorchester's* case, *He is no more to be valued than the black dog which lies there.* All which words were held actionable, and yet they touch not the persons in any thing concerning the government, or charge them with any crime, but in point of dignity or honour; and they were all vilifying words, and might give occasion of revenge.

* 4 Co 13 b. 2 Cro. 196.

† Hil 16 Car. II. Rot. 1269. Affirmed on a writ of error in B. R.

And so are the words for which this action is brought, they are rude, uncivil, and ill-natured; *unworthy*, is as much as to say base and ignoble, a contemptible person, and a man of neither honour or merit. And thus

 to

to ſpeak of a nobleman, is a reflection upon the king, who is the fountain of honour, that gives it to ſuch perſons who are (in his judgment) deſerving, by which they are made capable of adviſing him in parliament, and it would be very diſhonourable to call unworthy men thither.

'Tis likewiſe a diſhonour to the nobility to have ſuch a perſon to ſit among them as a companion, and to the commons to have their proceedings in parliament tranſmitted to ſuch peers: ſo that it tends to the diſhonour of all dignities, both of king, lords, and commons, and thereby diſcords may ariſe between the two houſes, which is the miſchief intended to be remedied by this act.

Then the following words are as ſcandalous; for to ſay *A man acts againſt law and reaſon*, imports ſeveral ſuch acts done; a man is not denominated to be unworthy by doing of one ſingle act; for in theſe words more is implied, than to ſay *he hath done an unworthy thing*; for the words ſeem to relate to the office which the plaintiff had in the country, as lord lieútenant, which is an office of great honour; and can any thing tend to cauſe more diſcord and diſturbance in the kingdom than to ſay of a great officer, *That he acts according to the dictates of his will and pleaſure?* The conſequence of which is, that he will be rather ſcorned than obeyed.

It hath been objected, that the words are general, and charge him not with any act. *Anſwer.* The ſcandal is the greater; for 'tis not ſo bad to ſay *A man did ſuch a particular thing againſt law and reaſon*, as to ſay, *He acts againſt law*; which is as much as to ſay, his conſtant courſe and practice is ſuch: and to ſay

ſay that the words might be meant of breaking a penal law, that is a foreign conſtruction; for the plain ſenſe is, he acts againſt the known laws of the kingdom, and his practice and deſigns are ſo to do, for he will be guided neither by law or reaſon.

Object. It has been objected that the ſcandal muſt be falſe: but whether true or not, there can be no juſtification here, becauſe they are ſo general, that they cannot be put in iſſue.

Anſw. He agreed that no action would lie upon this ſtatute if the words were true; but in ſome caſes the divulging of a ſcandal was an offence at the common law; now to argue (as on the other ſide) that the defendant cannot juſtify, and therefore an action will not lie, is a falſe conſequence; becauſe words may be ſcandalous and derogatory to the dignity of a peer, and yet the ſubject matter may not be put in iſſue.

He agreed alſo that occaſional circumſtances may extenuate and excuſe the words, tho' ill in themſelves; but this cannot be applied to the caſe in queſtion, becauſe the words were not mitigated: the defendant pleaded not guilty, and inſiſted on his innocence; the jury have found him guilty, which is an aggravation of his crime; if he would have extenuated them by any occaſion upon which they were ſpoken, he ſhould have pleaded it ſpecially, or offered it in evidence, neither of which was done.

This act is to be taken favourably for him againſt whom the words are ſpoken; becauſe 'tis to prevent great miſchiefs which may fall out in the kingdom, by rude and uncivil diſcourſes; and in ſuch caſes 'tis uſual for courts rather to enlarge the remedy than to admit of

any extenuation; for which reasons he prayed that the plaintiff might have his judgment.

It was argued by Serjeant *Calthrop* on the same side, and to the same effect.

Argument at the Bench.

Afterwards this term, all the judges argued this case, *seriatim* at the bench. And first, Justice *Scroggs* said, That the greatness of the damages given should not prevail with him, either on the one side or the other; at the common law no action would lie for such words, though spoken of a peer, for such actions were not formerly much countenanced; but now since a remedy is given by the statute, words should not be construed either in a rigid or mild sense, but according to the genuine and natural meaning, and agreeable to the common understanding of all men.

At the bar the strained sense for the plaintiff is, that these words import *He is no man of honour*; and for the defendant that they import *no scandal*, and that no more was meant by them, but what may be said of every man.

'Tis true, in respect of God Almighty, we are all unworthy, but the subsequent clause explains what unworthiness the defendant intended, for he infers him to be *unworthy, because he acts against law and reason.*

Now whether the words thus explained fix any crime on the plaintiff, is next to be considered, and he was of opinion that they did fix a crime upon him; for to say *He is an unworthy man*, is as much as to say, *He is a vitious person*, and is the same as to call him *a corrupt man*, which in the case of a peer is actionable; for general words are sufficient to support such an action, though not for a common person.

To

To ſay *a man acts againſt law and reaſon,* is no crime, if he does it ignorantly; and therefore if he had ſaid *My lord is a weak man, for he acts againſt law and reaſon;* ſuch words had not been actionable; but theſe words as ſpoken do not relate to his underſtanding, but to his morals; they relate to him alſo as a peer (though the contrary has been objected) that they relate to him only as a man, which is too nice a diſtinction; for to diſtinguiſh between a man and his peerage, is like the diſtinction between the perſon of the king and his authority, which hath been often exploded; the words affect him in all qualities and all relations.

It has been alſo objected, that the words are too general, and like the caſe of the biſhops return, that a man is *criminoſus,* which is not good. but though they are general in the caſe of a peer, they are actionable; for to ſay of a biſhop *that he is a wicked man,* theſe are as general words, and yet an action will lie.

It has been alſo objected, that general words cannot be juſtified; but he was of another opinion, as if the plaintiff, who was lord lieutenant of the county, had laid an unequal charge upon a man, who upon complaint made to him, ordered ſuch charge to ſtand, and that his will in ſuch caſe ſhould be a law. If the perſon ſhould thereupon ſay *that the lord had done unworthily, and both againſt law and reaſon,* thoſe words might have been juſtified, by ſhewing the ſpecial matter, either in pleading or evidence.

'Tis too late now to examine whether an action will lie upon this ſtatute, that muſt be taken for granted, and therefore was not much inſiſted on by thoſe who argued for the defendant; for the authorities are very plain, that

ſuch actions have been allowed upon this ſtatute.

The words as here laid to be ſpoken, are not ſo bad as the defendant might ſpeak, but they are ſo bad that an action will lie for them; and though they are general, yet many caſes might be put of general words which import a crime, and were adjudged actionable.

The Earl of *Leiceſter*'s caſe, *He is an oppreſſor:* the Lord of *Wincheſter*'s caſe, *He kept me in priſon till I gave him a releaſe:* theſe words were held actionable, becauſe the plain inference from them is, *That they were oppreſſors:* the Lord *Abergavenny*'s caſe, *He ſent for me, and put me into little eaſe:* it might be preſumed, that that lord was a juſtice of peace, as moſt peers are in their counties, and that what he did was by colour of his authority; ſo are all the caſes cited by thoſe who argued for the plaintiff, in ſome of which the words were ſtrained to import a crime, and yet adjudged actionable; eſpecially in the caſe of the Lord Marquis of *Dorcheſter*, *He is to be valued no more than a dog*; which are leſs ſlanderous words than thoſe at the bar, becauſe the ſlander is more direct and poſitive.

It appears by all theſe caſes, that the judges have always conſtrued in favour of theſe actions, and this has been done in all probability to prevent thoſe dangers that otherwiſe might enſue if the lords ſhould take revenge themſelves; for which reaſons he held the action would lie.

Atkyns, Juſtice, *contra.* This is not a common action upon the caſe, but an action founded upon the ſtatute of 2 *R. II.* upon the conſtruction whereof the reſolution of this caſe will

will depend, whether the action will lie or not. And as to that he considered,

1. The occasion.

2. The scope.

3. The parts of the statute.

1. The occasion of it is mentioned in *Cotton's* Abridgment of the Records of the *Tower*, *f.* 173. *nu.* 9 and 10. At the summoning of this parliament, the bishop of *St. David's* declared the causes of their meeting, and told both the houses of the mischiefs that had happened by divers slanderous persons, and sowers of discord, which he said were dogs that eat raw flesh; the meaning of which was, that they devoured and eat one another; to prevent which the bishop desired a remedy, and his request seemed to be the occasion of making this law; for *ex malis moribus bonæ nascuntur leges*.

2. The scope of the act was to restrain unruly tongues from raising *false reports, and telling stories and lies of the peers and great officers of the kingdom*; so that the design of the act was to prevent those imminent dangers which might arise, and be occasioned by such false slanders.

3. Then the parts of the act are three, *viz.* reciting the offence and the mischief, then mentioning the ill effects, and appointing of a penalty.

From whence he observed,

1. That here was no new offence made or declared; for nothing was prohibited by this statute, but what was so at the common law before.

The offences to be punished by this act, are *mala in se*, and those are offences against the moral law; they must be such in their nature,

ture, as bearing of falſe witneſs; and theſe are offences againſt a common perſon, which he admitted to be aggravated by the eminency of the perſon againſt whom they were ſpoken; but every uncivil word, or rude expreſſion ſpoken, even of a great man, will not bear an action; and therefore an action will not lie upon this ſtatute for every falſe lye, but it muſt be horrible as well as falſe, and ſuch as were puniſhable in the high commiſſion court, which were enormous crimes, 12 *Co.* 43.

By this deſcription of offences, and the conſequences and effects thereof, he ſaid he could better judge whether the words were actionable or not; and he was of opinion, that the ſtatute did not extend to words of a ſmall and trivial nature, nor to all words which were actionable, but only to ſuch which were of a greater magnitude, ſuch by which diſcord might ariſe between the lords and commons, to the great peril of the realm, and ſuch which were great ſlanders, and horrible lies, which are words purpoſely put into this ſtatute, for the aggravation and diſtinction of the crime; and therefore ſuch words which are actionable at the common law, may not be ſo within this ſtatute, becauſe not horrible great ſcandals.

He did not deny but that theſe were indecent and uncivil words, and very ill applied to that honourable perſon of whom they were ſpoken, but nobody could think that they were horrible great ſlanders, or that any debate might ariſe between the lords and commons, by reaſon ſuch words were ſpoken of this peer, or that it ſhould tend to the great peril of the kingdom, and the quick deſtruction thereof: ſuch as theſe were not likely to be the effects and conſequences of theſe words, and therefore

coul

could not be within the meaning of the act, becauſe they do not agree with the deſcription given in it.

2. Here is no new puniſhment inflicted on the offender, for at the common law any perſon for ſuch offences as herein are deſcribed might have been fined and impriſoned, either upon indictment or information brought againſt him, and no other puniſhment is given here but impriſonment.

Even at the common law ſcandal of a peer might be puniſhed by pillory and loſs of ears, 5 *Co.* 125, *de libellis famoſis*, 12 *Co.* 37. 9 *Co.* 59. *Lamb*'s caſe. So that it appears this was an offence at the common law, but aggravated now, becauſe againſt an act of parliament, which is a poſitive law; much like a proclamation which is ſet forth to enforce the execution of a law, by which the offence is afterwards greater.

He did agree, that an action would lie upon this ſtatute, though there were no expreſs words to give it to a peer, becauſe where there is a prohibition and a wrong and damage ariſes to the party, by doing the thing prohibited; in ſuch caſe the common law doth intitle the party to an action, 10 *Co.* 75. 12 *Co.* 100, 103. And ſuch was the reſolution in the Earl of *Northampton*'s caſe, upon conſtruction of the law as incident to the ſtatute, and as the offence is greater becauſe of the act, and as the action will lie upon the ſtatute, ſo the party injured may ſue in a *qui tam*, which he could not have done before the making this law.

3. But that ſuch words as theſe were not actionable at the common law, much leſs by the ſtatute; for the defendant ſpoke only his judgment and opinion, and doth not directly

charge

charge the plaintiff with any thing; and might well be resembled to such cases as are in *Roll's Abridgm.* 1 *part* 57 *pl.* 30. which is a little more solemn, because adjudged upon a special verdict; the words were spoken of a justice of peace, *Thou art a blood sucker, and not fit to live in a commonwealth.* These were not held actionable, because they neither relate to his office, or fix any crime upon him. *Fol.* 43, in the same book, *Thou deservest to be hanged*, not actionable, because it was only his opinion.

So, where the words are general, without any particular circumstances, they make no impression and gain no credit; and therefore in *Cro. Car.* 111. 1 *Roll. Abridgm.* 107. *pl.* 43. *You are no true subject to the King*; the action would not lie.

In this case 'tis said, the plaintiff acts against law, which doth not imply a habit in him so to do; and when words may as well be taken in a mild, as in a severe sense, the rule is *quod in mitiori sensu accipienda sunt.* Now these words are capable of such a favourable construction; for no more was said of the plaintiff, than what in some sense may be said of every person whomsoever; for who can boast of his innocence? Who keeps close in all actions to law and reason? And to say *a man acts against both*, may imply that he departed from those rules in some particular cases, where it was the error of his judgment only.

In the Duke of *Buckingham*'s case, *Sheppard's Abridgment*, 1 *part. f.* 28. *viz. You are used to do things against law*; and mentions a particular fact there indeed, because of *usage* of the ill practice, it was held that an action lies; but if he had been charged for doing a thing against law but once, an action would not lie.

He

He then observed how the cases which have been adjudged upon this statute, agree with the rules he had insisted on in his argument, which cases have not been many, and those too of late times; in respect of the antiquity of the act; which was made almost 300 years since, *anno* 1379. And for 120 years after no action was brought: the first that is reported was 13 *H. VII. Keilway* 26. So that we have no *contemporanea expositio* of the statute to guide an opinion, which would be a great help in this case, because they who make an act, best understand the meaning; but now the meaning must be collected from the statute itself, which is the best exposition, as the rule is given in *Bonham's* case, 8 *Co. vide* the case, in 13 *H.* 7.

The next case in time is the Duke of *Buckingham's* case, 4 *H.* 8. *Cromp. Jur. of Courts, f.* 13. *You have no more conscience than a dog. Lord Abergavenny against Cartwright,* in the same book, *You care not how you come by goods*; in both which cases the words charge the plaintiff with particular matter, and give a narrative of something of a false story, and do not barely rest upon an opinion. In the Bishop of *Norwich his case, Cro. Eliz.* 1. *viz. You have writ to me that which is against the word of God, and to the maintenance of superstition.* These were held actionable, because they refer to his function and greatly defame him, and yet he had but 530 marks damages. 29 and 30 *Eliz.* 1 *Cro.* 67. The Lord *Mordant against Bridges, My Lord Mordant did know that Prude robbed Shotbolt; and bid me compound with Shotbolt for the same; and said he would see me satisfied for the same, though it cost him an hundred pounds; which I did for him, being my master, otherwise*

2 *the*

the evidence I could have given would have hanged Prude. These words were held actionable, and 1000 l. damages given; and in all the other cases which have been mentioned upon this statute, and where judgment was given for the plaintiff, the words always charge him with some particular fact, and are positive and certain; but where they are doubtful and general, and signify only the opinion of the defendant, they are not actionable.

The words in the case at bar, neither relate to the plaintiff as a peer, or a lord lieutenant; and charge him with no particular crime; so that from the authority of all these cases he grounded his opinion, that the action would not lie; and he said, if laws should be expounded to wrack people for words, instead remedying one mischief, many would be introduced, for in such case they would be made snares for men.

The law doth bear with the infirmities of men; as religion, honour, and virtue doth in other cases; and amongst all the excellent qualities which adorn the nobility of this nation, none doth so much as forgiving of injuries; *Solomon* saith, *That 'tis the honour of a man to pass by an infirmity.* Which if the plaintiff should refuse, yet the defendant (if he thinks the damages excessive) is not without his remedy by attaint, for he said he could shew where an attaint was brought against a jury for giving 60 l. damages.

He farther said, that he could not find that any judgment had been either reversed or arrested upon this statute, and therefore it was fit that the law should be settled by some rule, because 'tis a wretched condition for people to live under such circumstances, as not to know

know how to demean themſelves towards a peer; and ſince no limits have been hitherto preſcribed, 'tis fit there ſhould be ſome now, and that the court ſhould go by the ſame rules in the caſe of a peer, as in that of a common perſon, that is, not to conſtrue the words actionable without ſome particular crime charged upon the plaintiff, or unleſs he alledge ſpecial damages; for which reaſons he held that this action would not lie.

Wyndham, Juſtice, accorded with *Scroggs*, and the Chief Juſtice *North* agreed with them in the ſame opinion; his argument was, *viz.*

Firſt, he ſaid that he did not wonder that the defendant made his caſe ſo ſolemn, being loaded with ſo great damages; but that his opinion ſhould not be guided with that or with any rules, but thoſe of law, becauſe this did not concern the plaintiff alone, but was the caſe of all the nobility of *England*; but let it be never ſo general, and the conveniences or inconveniences never ſo great, he would not upon any ſuch conſiderations alter the law.

He ſaid that no action would lie upon this ſtatute, which would not lie at the common law; for where a ſtatute prohibits a thing generally, and no particular man is concerned, an offence againſt ſuch a law is puniſhable by indictment; but where there is a particular damage to any perſon by doing the thing prohibited, there an action will lie upon the ſtatute, and ſo it will at the common law.

The words therefore which are actionable upon this ſtatute are ſo at the common law.

This ſtatute extends only to peers or other great officers, now every peer, as ſuch, is a great officer, he has an office of great dignity, he is to ſupport the king by his advice, of which

he

he is made capable by the great eminency of his reputation, and therefore all words which reflect upon him as he is the king's counsellor, or as he is a man of honour and dignity, are actionable at the common law.

In the ordinary cases of officers, 'tis not necessary to say that the words were spoken relating to his office, as to say of a lawyer that *he is a sot or an ignoramus*; or of a tradesman, *he is a bankrupt*; the action lies, though the words were not spoken of either as a lawyer or a tradesman.

Quæry?

He did not think that judges were to teach men by what rules to walk, other than what did relate to the particular matter before them; all other things are *gratis dicta*; neither would he allow that distinction, that an action would not lie where a man spoke only his opinion; for if that should be admitted, it would be very easy to scandalize any man, as *I think such a judge is corrupt*, or *I am of opinion that such a privy counsellor is a traytor*; and can any man doubt whether these or such like words are actionable or not, because spoken only as the sense of the person? 'Tis true, in some cases where a man speaks his own particular disesteem, an action will not lie, as if I say, *I care not for such a lord*, but that differs much where a man speaks his opinion with reference to a crime; for opinions will be spread, and will have an implicit faith, and because one man believes it another will; and 'tis upon this ground that all the cases which have been since the statute are justified; and so was the late case of the Marquis of * *Dorchester, He is no more to valued than the black dog which lies there*; which were words of disesteem, and only the opinion

* Sid. 233.

opinion of the defendant, in which cafe judgment was affirmed in a writ of error.

Object. If it be objected to what purpofe this ftatute was made if no action lies upon it, but what lay at the common law?

Anf. The plaintiff now upon the ftatute muft profecute *tam pro domino rege quam pro feipfo*, which he could not do at the common law. And it has been held in the *Star Chamber*, that if *Scandalum Magnatum* be brought upon this ftatute, the defendant cannot juftify, becaufe 'tis brought *qui tam*, &c. and the King is concerned; but the defendant may explain the words, and tell the occafion of fpeaking of them; if they are true, they muft not be publifhed, becaufe the ftatute was to prevent difcords.

Object. Thefe words carry in them no difefteem.

Anfw. According to common underftanding, they are words of difrefpect and great difefteem; for 'tis as much as to fay, that the plaintiff is a man of no honour; he is one who lives after his own will, and fo is not fit to be employed under the King. If any precedent difcourfe had qualified the fpeaking thefe words, it [illegible] by the defendant, [illegible] e-fore he conclu[illegible] n-ftanding what was objected, were actionable: and fo by the opinion of him, *Wyndham* and *Scroggs*, Juftices, judgment was given for the plaintiff.

Atkins, Juftice, of a contrary opinion.

Anne Afh v. Lady Afh, 8 W. III. B. R. Comb. 357. Falfe imprifonment; verdict for plaintiff with

Affault, battery, and falfe imprifonment. The Lady *Afh* pretended that her daughter, the plaintiff, was troubled in mind, and brought an apothecary to give her phyfic, and they

 bound

2000l. damages. New trial, the jury refusing to assign the reason why they gave such a verdict.

bound her, and would have compelled her to take physic. She was confined but about two or three hours, and the jury gave her 2000 l. damages.

New trial for excessive damages. N. B. The jury refused to give the reason of their verdict. Vide post.

Sir Barth. Shower moved for a new trial for the excessiveness of the damages.

Juries duty. Quære.

Holt, *Ch. J.*—The jury were very shy of giving a reason for their verdict, thinking they have an absolute despotic power; but I did rectify that mistake: for the jury are to try causes with the assistance of the judges, and ought to give reasons when required, that, if they go upon any mistake, they may be set right; and a new trial was granted.

Evidence.

Nota. Rookby, *J.* said *obiter*, that he had known some things given in evidence under the words *al' enormia*, which were *turpia*, and not fit to be mentioned in a declaration.

Prince v. Moulton, T. 9 W. III. B.R. Comb. 442. Judgment arrested, because [illegible] given than ought; i. e. for a longer space of time than the plaintiff actually lost, or could lose the use of his lands, according to his own shewing.

The plaintiff declares, that 2 *Juliis, sexto regni regis*, he was possessed of a close called the *Meadow*, and of another close called the *Pingle*; and that the defendant, 3 *Augusti*, *anno sexto prad.* a certain water-mill did erect, and the foundations thereof *ultra ius solito* did extend; by reason whereof the plaintiff lost the use and profit of his said close, from the said 2*d of July, sexto*.

The defendant pleaded not guilty, and a verdict was given at the assizes at *Chester* for the plaintiff, and entire damages assessed: and now it was moved in arrest of judgment, that the jury were inveigled to give damages from the 2d of *July*, which was before the mill was built: the jury, indeed, might have helped it in their verdict, but now it is too late. *Hob.* 189. *Harbin* and *Green*, *Mo.* 887. *S. C.*

Northy, *Contra.* One may lose the whole year's profits by an overflowing in harvest time.

Pasch. 4 *Regni, Regis, Horner* v. *Bridges*, trespass *tali die*, with a CONTINUANDO from a day which was before, yet held good: so in an action for words spoken at several times, if the words spoken at one of the times were not actionable, but only in aggravation; if entire damages given, they shall be intended only for what is actionable. [*Sed qu.?*] So *Roll.* 577. (5.) *Gosse* and *Pangnel*, about assigning over his trade.

Ward ad idem, cited *Allen* 22. *Syms* and *Gregory*, *Hob.* 282. *Hunt* and *Lawring*.

Cheshire ad idem, That if the plaintiff could lose the use and profits of his lands from the 2d of *July*, then damages are well given; if not, then the jury could not consider it.

Sir *Barth. Shower pro defendente.* As to the case, *Roll.* 577. the forbearing to exercise his trade was held a good consideration; *continuando's*, indeed, are rejected, when impossible or inconsistent, because the defendant is not bound to answer the *continuando*. The case of *Syms* and *Gregory* is answered by that of *Hambleton* and *Veer*, 2 *Saund.* 169. If a man brings an action in *Michaelmas* term for words spoken in *November*, it might be said there to be impossible, and helped by intendment, but always held ill.

Continuando.

HOLT, *Ch. J.*—Where the day is not material, as in trespass, *&c.* if you lay a day in the declaration, which is really after the action brought, and before the trial, the Judge of *Nisi Prius* will suffer you to give in evidence any day before the action brought; but the defendant may take advantage of it in arrest of judgment; but if you lay a day which is impossible, as the 30th of *February*, or a day which is not come at the time of the trial,

 there

there you may likewiſe give in evidence any day before the action brought, and there the defendant ſhall never take advantage of it in arreſt of judgment; becauſe the court will intend, that the plaintiff muſt have given in evidence a time before the trial, elſe he could not have had a verdict, and the fault in the declaration is cured by the verdict.

In the principal caſe, it is true, the plaintiff might loſe the profits of the whole year by an overflowing in harveſt-time; but here is the word *uſum*, which is impoſſible; and yet the jury might compute according to the declaration. I cannot diſtinguiſh it from the caſe of *Harbin* and *Green*, *Hob.* 189. *Judicium arreſtetur.*

Vide 2 Mod. 154.

Clerk v. Udall, M. 1 Ann. B. R. Salk. 649. New trial for exceſſive damages, and the ſame damages given, and third trial refuſed. See [illegible], [illegible].

Upon a trial at *niſi prius*, the jury gave exceſſive damages; and for this cauſe a new trial was granted. The ſecond jury gave the ſame damages again, and a ſecond new trial was moved for and denied, becauſe there ought to be an end of things: but ſeveral caſes were cited, which the Chief Juſtice allowed, that where, upon the ſecond trial, the jury have doubled the damages, a third trial had been granted.

Anonymous, M. 7 Geo. II. Barnes, 436. Action for a malicious proſecution; verdict for plaintiff; the judge certified the damages to be exceſſive, but the court of different opinion, and refuſed a new trial.

This cauſe was tried the laſt *Glouceſter* aſſiſes. Defendant moved for a new trial; and Mr. Juſtice *Page* certified the damages (which were 50 l.) to be exceſſive; but the action appearing to be brought for a very malicious proſecution, and plaintiff having been impriſoned and tried for felony, the court were of opinion, that, in the nature of the thing, the damages appeared to be moderate, and therefore refuſed to grant a new trial.

Chambers v. Robinſon, H. 12 Geo. II. 1 Stra. 691.

In an action for a malicious proſecution of an indictment for *perjury*, the Chief Juſtice allowed

allowed the plaintiff to give in evidence an advertisement put into the papers by the defendant of the finding the indictment, with other scandalous matter, though an information had been granted for it as a libel, not, as he said, that the jury were to consider it in damages, but only as a circumstance of malice.

Evidence.

Upon the trial it appeared, the perjury was ill assigned; so that the now plaintiff could not have been convicted; and that exception was taken to it by the Judge, and he was acquitted without examination of any witnesses. But the Chief Justice held the action lay, though it was a faulty indictment, relying upon the case of *Jones* v. *Gwynn*, where the distinction in *Salk.* 13. was denied, and held by the whole court that the action would lie, though the indictment was bad; a bad indictment serving all the purposes of malice, by putting the party to expence, and exposing him; but it serves no purpose of justice in bringing the party to punishment if he be guilty.

Action lies for malicious prosecution of a bad indictment.

Vide Jones v. Gwynn, Gilbert's Cases, Oct. 185.

Salk. 15.

Whereupon the jury gave the plaintiff 1000l. damages; and the next term the defendant moved the court for their judgment upon this point (which was saved at *nisi prius*) and for leave to move for a new trial after the court had given their opinion upon the point, which was granted: and as to the point of law, the court made no difficulty of agreeing with the case of *Jones* v. *Gwynn*, and the defendant's counsel did not seem to think the reason and authority of that case was to be shaken.

New trial granted for excessive damages, but the same damages being given a second time, another trial cannot be had.

Then the defendant moved for a new trial, on account of the excessiveness of the damages; and the court said it was but reasonable he should

* This said to be a bad reason, and the case denied to be law in Beardmore's case. Vide post.

try another jury *, before he was finally charged with 1000 l. So a new trial was granted, upon payment of costs. And a new trial being had, the same damages were given again; upon which the defendant applied to the court, who said it was not in their power to grant a third trial; and so is *Salk.* 649. the case of *Clark* v. *Udall.*

Vide ante.

Wilford v Berkley, T. 31 G. II. B. R. 1 Burr. 609. Action for crim. con. Verdict for plaintiff; 500 l. damages; defendant only a clerk in an office with a salary of 50 l. per ann. yet new trial refused.

Mr. *Morton*, on behalf of the defendant, moved for a *new trial* for EXCESSIVENESS *of damages.* It was an action for CRIMINAL CONVERSATION with the plaintiff's wife: and the jury (a special one) had given 500 l. damages. The defendant was a clerk in the Exchequer, during pleasure, at a salary of 50 l. a year only, which was his *whole subsistence.*

* Mr. Justice Foster was absent.

The court were, all * three, clear and unanimous, that although there was no doubt of the power of the court to exercise a proper discretion in setting aside verdicts for excessiveness of damages, *in cases where* the quantum of the damage really suffered by the plaintiff could be *apparent*, or were of such a nature that the court could *properly judge of the degree* of the injury, and could *see manifestly* that the jury had been outrageous in giving such damages as greatly exceeded the injury; yet the case was very different, where it depended *upon circumstances which were* PROPERLY and SOLELY *under the cognizance of the jury*, and were FIT to be submitted to *their* decision and estimate. And they held the case of criminal conversation with another man's wife to be of this *latter* kind: for the injury suffered by the husband, and the estimate of the damages to be assessed, must, in their nature, depend entirely upon CIRCUMSTANCES, which it was strictly and properly the province of the jury

to

to judge of; and, in the present case, the court could not say that 500 l. was too much or that 50 l. would have been too little.

Note.—The case of *Chem.* v. *Brigg*, *M* 6 *G. I. B. R.* before Lord Ch. J. *Pratt*, was exactly similar to this; and the very same sum of 500 l. was given: and the like motion was rejected then, upon the same principles as the court have now rejected the present one.

Motion denied.

Benson v. Sir Thomas Frederick, Bart. H 6 Geo. III. B. R. 3 Burr. 1845.

Action by a common soldier against his colonel, for an assault, viz twenty lashes, by two drummers; judgment per default; on inquiry 150 l. damages; motion to set aside inquiry refused.

Lord MANSFIELD reported the evidence given upon a writ of enquiry, which had been executed before him, and upon which 150 l. damages had been given.

It was an action brought against the defendant, who was colonel of the *Middlesex* militia, for ordering the plaintiff, who was a common man therein, and had a furlough from the major, to be stripped, and to receive twenty lashes from two drummers.

Mr. *Morton* had moved to set aside this verdict, for EXCESSIVENESS of *damages*; and had obtained a rule to shew cause. The counsel on both sides left it upon his Lordship's report.

Lord MANSFIELD said, He had no doubt but that it might be right to give an opportunity of reconsidering verdicts, where excessive damages had been given.

But in the present case, he was not dissatisfied with the verdict; for Sir *Thomas* had manifestly acted arbitrarily, unjustifiably, and unreasonably. He had ordered this innocent man to be flogged, (though unjustly and improperly,) merely out of spite to his major; because the major (*Spinnage*) who gave the man the furlough, had offended him: in which he acted *malo animo*, and out of mere

 spite

ſpite and revenge. And the man, though not much hurt indeed, was ſcandalized and diſgraced by ſuch a puniſhment. The defendant is a man of ſuch ſubſtance, as to be very able and ſufficient to pay this ſum; and could only ſave a part of it by having a new writ of inquiry, if we were to direct one. His Lordſhip acknowledged, that he thought the damages were very great, and beyond the proportion of what the man had ſuffered: and yet, under the whole circumſtances of the caſe, he was not for granting a new trial.

Mr. *Juſtice* WILMOT concurred; and obſerved, that it was rather owing to the lenity of the drummers than of the colonel, that the man did not ſuffer *more*.

Therefore, though he had no doubt but that the court might look upon theſe damages to be too high, in a common and ordinary caſe, and had power to ſet aſide the verdict, and award a new writ of inquiry; yet, as in *this* caſe, the defendant had acted very arbitrarily, and was well able to pay for it, he did not think the court were obliged to ſet aſide the verdict that the jury had found.

Mr. *Juſtice* ASTON concurred. He was very full in vindicating the diſcretion of the court to grant new trials, even when damages were ideal; and cited the caſe of * *Wood* v. *Gunſton*. But as in the preſent caſe, the defendant had acted very arbitrarily and unjuſtifiably, and under the circumſtances that appeared upon the report, he did not think *this* to be a proper occaſion for the court to ſet the verdict aſide.

* Vide ante.

Per Cur. unanimouſly, rule diſcharged.

On

On *Thursday* last, Sir *Fletcher Norton*, on behalf of the defendant, moved for a new trial, and to set aside the verdict, which had been given for the plaintiff, in an action for a malicious prosecution, with 250 l. damages, at the *Middlesex* sittings at *nisi prius*, before Lord *Mansfield*, on the 15th instant.

Monday 24th Nov. 1766. Farmer v. Sir Robert Darling, M. 7 Geo. III. B. R. 4 Burr. 1971. Malicious prosecution by two indictments for nuisances; verdict for plaintiff; 250 l. damages; motion for new trial; 1. for excessive damages; 2. 'as a verdict against evidence, i. e. want of proof of probable cause; new trial refused.

His objections were, 1st, That the damages were *excessive*; 2dly, That the verdict was *against evidence*.

He had a rule to shew cause.

Lord Mansfield now reported the evidence.

It was an action for a *malicious prosecution* of the plaintiff, by two indictments for nuisances; one by a drain, the other by his poulterer's yard, both of them near the prosecutor's house: upon which indictments the then defendant and now plaintiff had been acquitted.

It appeared upon the report, "That there "was malice implied:" and it appeared that the plaintiff had actually and *bonâ fide paid* 140 l. in defending himself against the two indictments.

His Lordship said, he told the jury, that the foundation of this action was MALICE; which must be either *express*, or *implied*: and he acquainted them, that they were *not* obliged to give *all* the 140 l. expended; or they *might* (on the other hand) give *more*, if they should see it proper to do so; he said, he left it to the jury to consider of the implied malice, from the groundlessness of the prosecution.

Sir *Fletcher Norton*, Mr. *Morton*, and Mr. Recorder *Eyre*, now argued on behalf of the defendant, for a new trial.

They

They ſaid, there was *another* requiſite to the maintenance of this ſort of action, BESIDES *malice*: it was *alſo* neceſſary to prove " that the " indictment was *cauſeleſs*, and *without any* " *foundation*:" both theſe are *eſſential*, and neceſſary to be proved.

As in a writ of conſpiracy, *falſity* is neceſſary to be charged; ſo in this caſe, *malice* ALONE is not ſufficient; it muſt alſo be a proſecution *without any foundation*. Theſe are two *independent* eſſentials to the maintenance of this action: there muſt be both malice and FALSITY.

We admit there was *ſome* evidence of *malice*; but it was proved, by ſufficient evidence, *to be a* NUISANCE: therefore there was a *probable cauſe* for the indictments; and if there was, then the proſecutor is not liable to this action for a malicious proſecution, whatever motive might induce the proſecutor to indict the perſon guilty of the offence. It would be of dangerous conſequence to make a proſecutor liable to this action, where there is a *probable cauſe* for indicting an offender.

Secondly, The damages are *exceſſive*; and the court may grant a new trial in matters of *tort*.

The bill of 140 l. was greatly *overcharged* in many articles. It ought to have been proved to have been *properly* paid, as well as *boná fide*. But this bill is not ſo: for *ſome* articles in it, there were no vouchers; and ſome of them are too general; as, for inſtance, " ſundry expences, fourteen guineas."

The counſel for the defendant alledged, that ſeventeen witneſſes proved, " that the " nuiſance *exiſted*:" one of whom was the foreman of the grand jury. And they alſo alledged,

alledged, that it was fully proved, "that Sir "Robert Darling did think, and had good reason to think, that it was a nuisance."

Besides, Farmer himself was the occasion of it's running to so great expence: for the indictments were found at Hicks's-hall, and he removed them hither by certiorari; it was he also that moved for a view: to which Sir Robert Darling consented, when he needed not to have done so. The defendant in the prosecution could not suffer any more damages than the money out of pocket. There could be no injury but to his property; there was none to his fame. He could be intitled to no compensation for any thing else but pecuniary damages; and the jury could take nothing further into their consideration, as the measure of the damages they were to give. 1 Salk. 13. Savil v. Roberts.

Mr. Stowe and Mr. Wallace contra, for the plaintiff, denied the damages to be excessive at all, much less against a man of great fortune; which a sheriff of London, they said, must be supposed to be, at least as far as 15,000 l. for otherwise, he might have been excused from serving the office by swearing himself off. This prosecution of the indictments was at the peril of the defendant's trade, which would have been destroyed, if the prosecution had succeeded.

Upon the whole evidence, we proved, and the jury believed, that the indictments were groundless, as well as malicious.

In such an action as this is, the court cannot measure the damages by any certain rule: they have none to go by. The articles in the bill of costs were all of them necessary expences to the plaintiff, in order to defend himself

ſelf againſt theſe indictments, and were ready to have been proved, if objected to at the trial: and the whole was proved to have been *bonâ fide paid*. And he had reaſon to remove them from a court where the proſecutor would have been upon the bench.

The diſtreſs and vexation, and all the inconveniencies the plaintiff was put to, may fairly be taken into the conſideration of his damages, as well as the pecuniary expences.

Lord MANSFIELD.—This action is for a malicious proſecution, without a probable cauſe.

I cannot ſay that the jury have done wrong here, in finding that the indictments were preferred without probable cauſe.

This drain was an ancient drain. The fault aroſe above and below *Farmer*'s part of it. His brick-drain was cleaned and clear. The gift of the indictment was, that he did not "lower his drain:" he had no need to do it.

The verdict was not, in my opinion, againſt evidence.

The next proſecution was for the feeding the fowls. And I cannot ſay that the jury had no reaſon to find this likewiſe to be an indictment without probable cauſe.

Every ſtench is not a nuiſance; nor is every noiſome trade a nuiſance in *every place*; though many of them are nuiſances by reaſon of their *locality*. This was an ancient trade, long carried on in this place; long before Sir *Robert Darling* came there. He comes and builds a houſe near it, in a place that was formerly a poultry-yard. Nobody before complained of it, or preſented it. So that the concluſion does not follow, "that it was a *nuiſance*." And the jury had a *view*; therefore I cannot ſay,

I that

that the jury had no reaſon to take the proſecution to be groundleſs.

As to the exceſſiveneſs of the damages—it does not appear by the verdict, how far the jury gave it upon the *bill*; and how far, upon the whole *circumſtances* of the caſe taken together.

The end and tendency of theſe two indictments was to drive this plaintiff from his buſineſs of a poulterer, after having long carried it on. This was ſworn to be the proſecutor's view in preferring them. And they might affect the man's *credit*.

There are many circumſtances which make it reaſonable, not to indulge the preſent defendant in ſending it to a new litigation, only to abate the *quantum* of the damages, when he has been ſo much in the wrong.

Therefore he was againſt granting a new trial.

The THREE *other* JUDGES entirely agreed with his lordſhip in both points; and expreſſed their ſentiments at large to the ſame effect. They likewiſe agreed with Sir *Fletcher Norton*, as to the grounds of this ſort of action; *viz.* "That "*malice*, (either expreſs or implied,) and the "*want of probable cauſe* muſt *both* concur." But they were clearly of opinion, that it appeared upon the whole ſtate of the evidence, that in this caſe they *did* both concur. Therefore they thought the rule ought to be diſcharged; both objections being ſufficiently anſwered.

Per cur. unanimouſly.

Rule diſcharged.

Leeman v. Allen and others. E. 3 Geo. III. B.R. 2 Wils. 160. Impriſonment for a few hours, 300 l.

TRESPASS, aſſault, and impriſonment, to the plaintiff's damage of 300 l. The defendant pleaded the general iſſue; upon the trial the jury gave a verdict for the plaintiff, and

300 l. damages not exceffive, and new trial refufed.

Verdict not fet afide for a variance between the iffue delivered and the record of nifi prius after a defence.

300 l. damages. In the paper book of the iffue, delivered to the defendant with notice of trial, the damages (by miftake) were laid only 200 l. but the record of *nifi prius* was right, and agreeable to the roll, which was 300 l. damages; after a defence made at the trial, it was now moved by Serjeant *Nares* for the defendants to fet afide the verdict upon two matters: 1ft, becaufe there is a variance between the iffue book delivered and the *nifi prius* record; and 2nd, becaufe the damages are exceffive.

It appeared in evidence at the trial, that the plaintiff kept the *Rummer* tavern, in *Chancery-lane*; that the defendants are perfons called reforming conftables, and under pretence of a warrant from one *Kynafton*, a juftice of peace, entered the plaintiff's houfe with ftaves, there feifed and carried her into the yard, and faid, "*now we have got her, and will carry the bitch* "*to New Prifon*;" the defendants would not fay what crime fhe was guilty of, or charged with; *Allen*, the conftable, had a warrant, but he did not fhew it; that the next morning the plaintiff went to Mr. *Kynafton*'s houfe, but he was not at home; then fhe went to Juftice *Cox*'s, and again to Mr. *Kynafton*'s, but none of the defendants appeared to profecute her. *John Slade*, the waiter at the tavern, proved, that a man and a woman came to plaintiff's houfe (who looked like fellow-fervants) between nine and ten o'clock, one evening in *Eafter* week, a few minutes before this imprifonment was done; that they appeared to be honeft fober perfons, and came to refrefh themfelves; that he faw the defendants armed with bludgeons, take and feize the plaintiff, his miftrefs; that *Allen* laid hold of her, and faid, "Now damn you "for

"for a bitch we have got you, and we are "determined you ſhall go to New-Priſon;" other witneſſes gave evidence to the like effect; that theſe defendants called themſelves reformers; about twenty witneſſes proved the *Rummer* tavern to be a houſe of good repute, and no body proved the contrary; it was alſo proved that one of the defendants ſtruck the plaintiff. That the defendants never proſecuted the plaintiff, nor did they appear againſt her when ſhe went before the juſtice next day. For the defendants, one *William Gardiner*, who was accidentally preſent in court at the trial, ſwore he was at the *Rummer* when this affair happened, and that he heard no oaths, nor the word *bitch*, *&c.* It appeared that the warrant was granted and ſigned by Juſtice *Kynaſton*, to enter this houſe, upon an allegation that the plaintiff kept a looſe and diſorderly houſe; that they had two warrants, one for *London*, and another for *Middleſex*, becauſe this houſe ſtands partly in and out of the city, which they kept five weeks before they executed them; that they frequently watched the houſe, and when they imagined any lewd perſons went into the houſe they took that opportunity to execute the warrant; this is the ſubſtance of the evidence, whereupon the jury found for the plaintiff, and 300 l. damages.

Chief Juſtice.—1ſt, As the defendants made a defence at the trial, the court will not ſet aſide the verdict for the variance between the iſſue book delivered in paper; and the record of *niſi prius*, which was not mentioned or objected to, at the trial; and if the record of *niſi prius* had been wrong, the court would

have

have amended it by the roll, after a verdict and a defence made.

2nd, As to the exceſſiveneſs of damages; courts ſhould be very cautious how they overthrow verdicts that have been given by twelve men upon their oaths; however, if damages be unreaſonable and outrageous indeed, as if 2000 l. or 3000 l. was to be given in a little battery, which all mankind might ſee to be unreaſonable at firſt bluſh; certainly a court would ſet aſide ſuch a verdict, and try whether a ſecond jury would not be more reaſonable. The rule in the caſe of *Aſh* v. *Aſh*, *Comb.* 357. laid down by Lord *Holt*, is a good one;— "That the jury are to try cauſes with the "aſſiſtance of the judges, and ought to give "their reaſons, when required, that if they "go upon any miſtake they may be ſet right; "and for their not doing ſo, and for exceſſive-"neſs of damages, a new trial was granted." And this rule is univerſal, and extends to all ſorts of actions; but it may be ſaid, what rule has the court to govern themſelves by as to matters of *tort*? I anſwer, the court muſt be able to ſay the damages are beyond all meaſure unreaſonable, though they cannot ſay exactly what damages ought to be given. I do not think the damages exceſſive in the preſent caſe; here are a number of perſons like a new ſort of grand jury, who meet once or twice in a week, and take upon themſelves to preſent, correct, reform, and commence proſecutions; a warrant is granted by *Kynaſton*, a reforming juſtice, on the information of one *Triſtram*, who is fled for an abominable crime; there was no account given at the trial of the matter of his information to *Kynaſton*, who did not appear, though he was *ſubpœnaed*; the warrant

Vide ante.

is

is pocketed five weeks, the defendants watch and wait 'till they can dodge a lewd woman into the out-rooms of this houſe, where they had not been five minutes, before the defendants entered with bludgeons, and ſeized upon the perſon of the plaintiff, and would have carried her to priſon that night, if her neighbours had not then interpoſed and undertaken that ſhe ſhould appear before Juſtice *Kynaſton* next morning, which ſhe did, but the defendants never purſued the warrant one ſtep farther. I think the king's-bench would grant an information againſt theſe perſons for ſetting themſelves up as a kind of grand jury; an informer is a moſt odious character; and I am glad of an opportunity of declaring my diſlike towards theſe reformers. The whole court refuſed to ſet aſide the verdict, and the plaintiff had judgment.

Huckle v. Money. M. 4 Geo. III. C. B. 2 Wilſon 205. A new trial for exceſſive damages in aſſault and impriſonment refuſed. Vide Eſſay I. [E.] (a.) tit. Bills of Exceptions.

TRESPASS, aſſault, and impriſonment; iſſue joined upon the general iſſue, not guilty; tried before the Lord Chief Juſtice, when it was proved for the plaintiff that he is a journeyman printer, and was taken into cuſtody by the defendant (a king's meſſenger) upon ſuſpicion of having printed the *North-Briton*, number 45; that the plaintiff kept him in cuſtody about ſix hours, but uſed him very civilly by treating him with beef-ſteakes and beer, ſo that he ſuffered very little or no damages; the defendant attempted to juſtify under the GENERAL WARRANT of a ſecretary of ſtate, to apprehend the printers and publiſhers of the ſaid *North-Briton*, number 45, by virtue of the *ſtat.* of *Jac. I. and the ſtat.* 24 *Geo. II. cap.* 44. but was over-ruled by the Lord Chief Juſtice; whereupon the king's counſel, who were ad-

vocates for the defendant, tendered a bill of exceptions; the jury gave 300 l. damages.

It was now moved by Serjeant *Whitaker*, that the verdict might be set aside, and a new trial had; for that it appeared upon the evidence the plaintiff was only a journeyman to *Leech* the printer, at the weekly wages of a guinea; that he was confined but a few hours, and very civilly and well treated by the defendant, so that 300 l. were most outrageous damages in this case, and a new trial he hoped would be granted; and cited *Chambers* v. *Robinson*, 1 *Stra.* 691. which was an action for a malicious prosecution upon an indictment wherein the jury gave 1000 l. damages, and the court granted a new trial for the excessiveness of the damages; several other similar cases were cited to induce the court to grant a new trial.

Vide ante.

Serjeant *Burland*, for the plaintiff, insisted that in cases of *tort*, which sound merely in damages, and are not like *debt* or *assumpsit*, the court will never interpose in setting aside verdicts for excessive damages; that in the case of *Leeman* against *Allen* and other reforming constables, *C. B.* in an action of trespass and imprisonment, the jury gave 300 l. damages; and this court refused to grant a new trial, though the plaintiff had not been imprisoned above 24 hours. And in a late case in *B. R.* for criminal conversation, 500 l. damages were given against a man in very poor circumstances, as appeared to the court by affidavit, and yet they would not grant a new trial, but said they could not interpose in cases of *tort*, unless the damages were very outrageous; but that the jury were the sole judges of the damages.

Vide ante.

Vide ante.

Lord

Lord Chief Justice.—In all motions for new trials, it is as abſolutely neceſſary for the court to enter into the nature of the cauſe, the evidence, facts, and circumſtances of the caſe, as for a jury; the law has not laid down what ſhall be the meaſure of damages in action of *tort*; the meaſure is vague and uncertain, depending upon a vaſt variety of cauſes, facts, and circumſtances; *torts* or injuries which may be done by one man to another are infinite; in caſes of criminal converſation, battery, impriſonment, ſlander, malicious proſecutions, *&c.* the ſtate, degree, quality, trade, or profeſſion of the party injured, as well as of the perſon who did the injury, muſt be, and generally are, conſidered by a jury in giving damages; the few caſes to be found in the books of new trials for *torts*, ſhews that courts of juſtice have moſt commonly ſet their faces againſt them; and the courts interfering in theſe caſes would be laying aſide juries: before the time of granting new trials, there is no inſtance that the judges ever intermeddled with the damages.

I ſhall now ſtate the nature of this caſe, as it appeared upon the evidence at the trial; a warrant was granted by Lord *Halifax*, ſecretary of ſtate, directed to four meſſengers, to apprehend and ſeiſe the printers and publiſhers of a paper called the *North-Briton*, number 45, without any information or charge laid before the ſecretary of ſtate, previous to the granting thereof, and without naming any perſon whatſoever in the warrant: *Carrington*, the firſt of the meſſengers to whom the warrant was directed, from ſome private intelligence he had got that *Leech* was the printer of the *North-Briton*, number 45, directed the defendant to

 execute

execute the warrant upon the plaintiff (one of *Leech*'s journeymen), and took him into custody for about six hours, and during that time treated him well; the personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20 l. damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life, did not appear to the jury in that striking light, in which the great point of law, touching the liberty of the subject, appeared to them at the trial; they saw a magistrate over all the king's subjects, exercising arbitrary power, violating *Magna Charta*, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this GENERAL WARRANT before them; they heard the king's counsel, and saw the solicitor of the treasury, endeavouring to support and maintain the legality of the warrant, in a tyrannical and severe manner: these are the ideas which struck the jury on the trial, and I think they have done right in giving exemplary damages: to enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the *Spanish* inquisition; a law under which no *Englishman* would wish to live an hour; it was a most daring public attack made upon the liberty of the subject: I thought that the 29th chapter of *Magna Charta*, *Nullus liber homo capiatur vel imprisonetur, &c. nec super eum ibimus, &c. nisi per legale judicium parium suorum vel per legem terræ, &c.* which is pointed against against arbitrary power, was violated.

I cannot say what damages I should have given, if I had been upon the jury; but I directed

directed and told them they were not bound to any certain damages, against the solicitor-general's argument. Upon the whole I am of opinion the damages are not excessive; and that it is very dangerous for the judges to intermeddle in damages for *torts*; it must be a glaring case indeed of outrageous damages in a *tort*, and which all mankind at first blush must think so, to induce a court to grant a new trial for excessive damages.

BATHURST, *Justice*:—I am of my lord's opinion, and particularly in the matter of damages, wherein he directed the jury that they were not bound to certain damages: this is a motion to set aside 15 verdicts in effect; for all the other persons who have brought actions against these messengers, have had verdicts for 200l. in each cause by consent, after two of the actions were fully heard and tried.——CLIVE, Justice, absent.

Per curiam, new trial refused.

Arthur Beardmore, an attorney, v. Nathan Carrington, James Watson, Thomas Ardran, and Robert Blackmore, four of the king's messengers in ordinary.

Er. Tm. 4 Geo. III. 1764.

A new trial was refused in an action of trespass and imprisonment under a secretary of state's warrant, where 1000 l. damages were given for six days imprisonment, and the entering plaintiff's house, and seising his books & papers.

THIS was an action of trespass and false imprisonment; the plaintiff declared that on the 11th of *November*, 1762, the defendants broke and entered his dwelling-house at *London*, in the parish of *St. Stephen*, *Wallbrooke*, in the ward of *Wallbrooke*, and continued therein four hours, disturbed him in his possession, broke and forced open several doors of the rooms, and broke and spoiled the locks, bolts, and bars thereof, and broke and forced open many boxes, chests, bureaus, scrutores, writing-desks, drawers, and cup-boards of the plaintiff, in his house, and the locks thereof, and searched and examined all the rooms in the house, and all the boxes, &c. so broke open, and read over, pryed into, and examined all the private papers, books, letters, and correspon-

dence

dence of the plaintiff and his clients, whereby the secret and private affairs, concerns, business, and circumstances of the plaintiff, and his clients, became and were wrongfully discovered, and made public; and then and there seised, took, and carried away 500 printed charts, and a great many other papers, printed and written, (particularly mentioned) and took, and closely imprisoned the plaintiff for nine months, whereby he was hindered from following and transacting his lawful affairs and business, and was thereby put to great expences in his maintenance during his imprisonment; and in obtaining his legal discharge and release therefrom, against the peace, &c. to the damage of the plaintiff 10,000 l.

The defendants pleaded first, not guilty; and, 2dly, by leave of the court, as to the breaking and entering the dwelling-house, continuing there, disturbing the plaintiff in his possession, forcing open the said doors, forcing open the boxes, chests, &c. and examining his private papers, &c. and carrying away the goods, &c. and imprisoning the plaintiff and detaining him for six days and an half; they plead that the plaintiff ought not to have his action against them, because, they say, that before the trespass, &c. was supposed to be committed, *viz.* on the 6th of *November*, 1762, the Earl of *Halifax* was, and yet is one of the lords of the king's privy council, and one of his principal secretaries of state, and that he on the 6th of *November*, 1762, made his warrant under his hand and seal, directed to the defendants, four of the king's messengers in ordinary, by which warrant the earl did, in the king's name, authorise and require them, (the defendants) taking a constable to their

assistance,

affiſtance, to make ſtrict and diligent ſearch for the ſaid *Arthur Beardmore*, mentioned in the ſaid warrant to be the author, or one concerned in the writing of ſeveral weekly very ſeditious papers, intituled the *Monitor*, or *Britiſh Freeholder*, number 357, 358, 360, 373, 376, 378, 379, and 380. *London*, printed for *J. Wilſon* and *J. Fell*, in *Pater-noſter-row*; which contained groſs and ſcandalous reflections and invectives upon his majeſty's government, and upon both houſes of parliament, and him the ſaid *Arthur Beardmore* having found, to ſeiſe and apprehend, and to bring him, together with his books and papers, in ſafe cuſtody, before the ſaid Earl of *Halifax*, to be examined concerning the premiſes, and further dealt with according to law, &c. That the ſaid warrant was, that day, delivered to the defendants to be executed; that they took *C. W.* a conſtable, to their aſſiſtance, and on the ſame day in the declaration, they went towards the plaintiff's houſe and found him near to it, and did there ſeiſe and apprehend him by virtue of the warrant, and immediately the ſame day, about ten o'clock in the forenoon, being the time when, &c. entered his dwelling-houſe, (the door being then open) to ſearch for, and ſeiſe the books, papers, &c. of the plaintiff, and to bring them with the plaintiff, before the Earl of *Halifax*, according to the exigency of the warrant; and ſo the defendants go on and juſtify the treſpaſs aforeſaid, and ſay they delivered the books, papers, &c. to *Lovel Stanhope*, an aſſiſtant of the Earl of *Halifax*, and a juſtice of peace for *Weſtminſter*, to be examined; and that they kept the plaintiff in cuſtody, 'till he gave bail for his appearance in the king's-bench, the then

 next

next term, to anſwer ſuch matters as ſhould be objected againſt him; and then the defendants, by order of the Earl of *Halifax*, diſcharged the plaintiff, and they ſay that he was neceſſarily put to expences by ſuch detainer, which is the ſame treſpaſs complained of. There is another juſtification much to the ſame purport. The plaintiff replied *de injuria ſua propria*, whereupon iſſue was joined; and at the trial the jury were directed to aſſeſs damages, under an idea that the treſpaſs and impriſonment committed under this warrant, could not be juſtified by any plea whatſoever; and they found a verdict for the plaintiff, and gave him 1000 l. damages.

It was moved by the king's ſerjeants that the verdict might be ſet aſide, for exceſſive damages; upon ſhewing cauſe, the Lord *Chief Juſtice* ſtated the ſubſtance of the evidence given at the trial as follows:

The plaintiff called his clerk, *David Meredith*, who proved, that on the 11th day of *November*, 1762, he found all the defendants in the plaintiff his maſter's houſe, and in the private office *there*, opening the drawers and taking out papers; that they demanded the plaintiff's file of letters, and examined them back 'till the year 1752. Defendant *Carrington* then ſaid, "that was ſufficient;" afterwards they went into the public office, and there opened the deſk, took out the books, and looked into the ledgers, but did not break any deſks or drawers open, becauſe the plaintiff opened the ſame for them; afterwards they took the plaintiff and this witneſs away in a coach; this witneſs proved that the plaintiff was then concerned in a great many cauſes depending, as an attorney, that he ſent for Mr.

Winbolt,

Wimbolt, to manage his buſineſs while he ſhould remain in confinement; that no violence was offered to the perſon of the plaintiff, and that his wife was permitted to be with him; that this witneſs had actions depending againſt the defendants and Lord *Halifax*; that the defendants refuſed to permit one Mr. *Collet*, who was a client of the plaintiff, to converſe privately with him about his buſineſs; that while the plaintiff and this witneſs were confined in the houſe of the defendants, he the plaintiff was ſuffered to go into any part of the houſe, and after ſix days impriſonment, they were both diſcharged, upon entering into recognizances to appear in the king's-bench the then next term, and for their good behaviour, without paying any fees.

Mr. *Collet*, a client of the plaintiff, ſwore that the plaintiff was concerned in ſome cauſes for him at that time, and that he deſired to ſpeak with him in private about his buſineſs, but he was refuſed by the defendants to ſpeak to the plaintiff privately, and to write down what he wanted to ſay; that pen and ink were refuſed to him, but the defendants told him he might ſpeak publicly to the plaintiff, in the hearing of the defendants if he pleaſed; it was alſo proved that the plaintiff was then refuſed the liberty of writing a letter to Mr. *Alderman Beckford*, one of the members of parliament for the city of *London*; this was the ſubſtance of the plaintiff's evidence.

For the defendants, *Lovel Stanhope*, eſq; deputy ſecretary of ſtate, aſſiſtant to Lord *Halifax*, was called, who ſwore that his buſineſs was to look into, and examine all papers touching the government; that he took an oath of office, and was to pay obedience to the

the orders of the secretary of state; he said that on these occasions, when the messengers have a man in custody, they are not to do any thing without his orders; that Lord *Halifax* ordered the plaintiff to be bailed, and that he was continued upon his recognizance from term to term for several terms. It was admitted on all sides at the trial, that there have been a great many precedents of warrants of the like sort with the present, for the seising persons and papers, &c. and for all sorts of crimes or offences, let the offence be what it would; and this was the substance of the defendants evidence.

For the defendants it was said, that for six days and an half confinement in a messenger's house, where little or no injury had been done either to the plaintiff's person, house, or goods, 1000 l. were excessive and outrageous damages, and that if the court saw that they were excessive, they had power to grant, and would grant a new trial, even in cases of *tort*. • It is said the case of *Wood* and *Gunston*, *Styles* 466. *Mich*. 1655. is the first instance of granting a new trial; but this seems to be a mistake, for there were new trials granted long before, as appears from this, *viz*. that it is a good challenge to a juryman to say, that he hath been a juror before in the * same cause: *per Holt*, *C. J.* 2 *Salk*. 648. It is true that in *Roe* and *Hawkes*, 1 *Lev*. 97. † it is said by *Twisden*, Justice, that the new trial in *Wood* and *Gunston*, was not merely granted for excessiveness of damages, but for tampering with the jury; but in 1 *Sid*. 131. and in 2 *Mod*. 151. it is said that the new trial in *Wood* and *Gunston* was for excessiveness of damages; that was an action for words, and is a case in point, that the court has

• Vide ante.

* This might be in the case of a venire facias de novo awarded, where a mis-trial has been had.

† Vide ante.

has power to grant new trials in cafes of *tort* for exceffive damages. Suppofing new trials firft began in the reign of *Charles* the Firft, yet it appears from the Year-books, long before that time, that courts of juftice (not having then come into granting new trials) when they faw reafon for it, either leffened or increafed the damages, as they do in the cafe of *maihem* to this day, upon view of plaintiff's *maihem*, and identifying his perfon; and for this purpofe thefe cafes were cited from the Year-books, *Mich.* 22 *Ed. III. fol.* 11. *c.* 10. which was a battery. *Mich.* 3 *Hen. IV. fol.* 4. *c.* 16. *Mich.* 7. *H. IV.* 31. *b. c.* 15. in confpiracy, where the plaintiff releafed part, or the court would have abridged the damages according to their confcience. *Eafter*, 8 *Hen. IV. fol.* 23. *c.* 9. the Juftice of *Nifi Prius* thought the damages too little, yet they would not increafe them without feeing the *maihem*. *Mich.* 19 *H. VI.* 10. *b. c.* 28. *Trin.* 32 *H. VI.* 1. *a. c.* 2. in debt the parties were at iffue, and the jury found for the plaintiff damages 6 s. 8 d. and cofts 20 s. the court increafed the damages to 13s. and 4d. more. *Dyer* 105. *Palm.* 314. From thefe ancient cafes it was argued, that courts of juftice have, in all times, confidered themfelves authorifed to review the damages given by juries, in all kinds of actions, and either to abridge, or increafe them; and fince that practice has been difufed, and abridging damages by the court has been looked upon as unconftitutional, new trials have been granted for exceffive damages.

For the plaintiff it was faid, that new trials can only be granted in cafes where the court can clearly fee that the jury is miftaken, or have mifbehaved themfelves; all the cafes of

I new

new trials tend to prove, that where the court have no meaſure to direct them, they cannot grant a new trial, there muſt be ſome infallible mark for them to go by in the caſe; no two judges in the world can agree what damages ought to be given in the preſent caſe, for damages here lie in ſpeculation. That the miſconduct of juries ſeems to have been the firſt occaſion of new trials. It is ſaid new trials were firſt introduced to prevent attaints; but an attaint would not lie in this caſe, for there is no poſſibility of pointing out how far the damages are exceſſive or not. The caſe in *Styles* 466, was not for exceſſive damages, but for tampering with the jury; it was ſaid in that caſe to be a *packed buſineſs.* In the caſe of Lord *Townſhend* for words, 2 *Mod.* 150. the court ſaid they had no ground whereby they could meaſure the damages, and refuſed a new trial. *Aſh* and *Aſh, Comb.* 357. is not to the purpoſe; Lord *Holt* aſked the jury upon what ground they went, but they refuſed to anſwer him, and ſo were guilty of a miſconduct.

Vide ante.

Vide ante.

Curia. We are called upon, on our oaths to ſay, whether theſe are exceſſive damages or not, and ought to have very clear evidence before us, before we can ſay they are exceſſive. The jury were directed to aſſeſs damages for the plaintiff according to the evidence given, under an idea that the defendants could not by law juſtify the treſpaſs under this warrant, by any manner of plea whatſoever. It is clear that the practice of granting new trials is *modern*, and that courts anciently never exerciſed this power, but in ſome particular caſes they corrected the damages from evidence laid before them. There is great difference

ference between cafes of damages which be certainly feen, and fuch as are ideal; as between *affumpfit, trefpafs for goods*, where the fum and value may be meafured, and actions of *imprifonment, malicious profecution, flander, and other perfonal torts*, where the damages are matter of opinion, fpeculation, ideal. There is alfo a difference between a principal verdict of a jury, and a writ of inquiry of damages; the latter being only an inqueft of office, to inform the confcience of the court, and which they might have affeffed themfelves, without any inqueft at all; only in the cafe of *maihem*, courts have in all ages interpofed in that fingle inftance only. As to the cafe of the writ of inquiry in the Year-book of *H. IV.* we doubt whether what is faid by the court in that cafe be right, *That they would abridge the damages, unlefs the plaintiff would releafe part thereof*, becaufe there is not one cafe to be found in the Year-books, where ever the court abridged the damages after a principal verdict; and this is clear down to the time of *Palmer's Rep.* 314. much lefs have they interpofed in increafing damages, except in the cafe of *maihem*. One fide fays no *attaint* lies (in cafes of *tort*) for exceffive damages; the other fide fays it does: we give no opinion as to that point; but it is faid in a hundred cafes in the books, that an attaint does lie, See 10 *Rep.* 119. Lord *Cheyney's* cafe.

All, or moft of the cafes of new trials, are where juries have * mifdemeaned themfelves contrary to their oath; in the cafe in *Styles* 466. the mifconduct of the jury was certainly an ingredient, and fo it appears from the cafe in 1 *Lev.* 97. Some books fay it was a trial at

* The Judge who tried the caufe, ufed to certify to the court the mifbehaviour. Cro. El. 189, 411, 616. 3 Keb. 351.

at bar, and it is highly probable there was ſome evidence, that the jury had been tampered with; and this was certainly the very firſt caſe of a new trial; and from that period the courts have exerciſed the power of granting new trials in ſeveral caſes: as when the jury find contrary to the judges directions in point of law; when they find directly contrary to the evidence; (that is to ſay,) againſt evidence all one ſide, for if there be evidence on both ſides, the court never interpoſes in that caſe.* As to the granting the firſt new trial in *Styles* 466. there is great reaſon (as was ſaid before) to think it was for miſbehaviour in the jury; it was an action for words; ſo was the caſe of Lord *Townſhend*, 2 *Mod.* 250. for words, and 4000 l. damages, where the court refuſed to grant a new trial. And if a court could not ſay that thoſe damages were exceſſive, they can hardly ſay that damages are exceſſive in any caſe of ſlander whatever; and this caſe has never been contradicted, or denied to be law. The caſe of *Aſh* and *Aſh*, *Comb*, 357. was plainly for the miſdemeanour of the jury, in refuſing to anſwer the judge, when he aſked what ground or reaſon they went upon. To be ſure judges are to adviſe, but not to controul juries; and my Lord *Holt* and the King's-Bench did right, in granting a new trial in that caſe. In the caſe of *Wilford* v. *Berkley*, *Trin.* 31 and 32 *G. II. B. R.* which was an action for criminal converſation, the jury gave 500 l. damages againſt the defendant; and, upon affidavits that he was only a clerk in low circumſtances, and unable to pay ſo large a ſum, it was moved for a new trial; but the court refuſed to grant even a rule to ſhew cauſe, becauſe in caſes of *tort*, the

351. Styl. 448. Moor. 451, 452. Bacon v. Hutchinſon, Eaſter term, 8 Ann.

* C. B. a rule to ſtay the judgment until the judge's certificate; Palm. 325. Concerning miſdemeanor of juries, ſee 2 H. P. C. 306, 307, &c. Cro. Jac. 210. c. 2.

Vide ante Wilford and Berkley.

the jury are the only proper judges of the damages.

We are now come to the caſe in 1 *Stra.* 691. *Chambers* v. *Robinſon*; which ſeems to be the only caſe where a new trial was granted merely for the exceſſiveneſs of damages only. We are not ſatisfied with the reaſon given in that caſe, and think it of no weight, and want to know the facts upon which the court would pronounce the damages to be exceſſive; the principle on which it was granted, mentioned in *Strange*, was *to give the defendant a chance of another jury*: this is a very bad reaſon; for if it was not, it would be a reaſon for a third and fourth trial, and would be digging up the conſtitution by the roots; and therefore we are free to ſay, this caſe is not law; and that there is not one ſingle caſe, (that is law,) in all the books to be found, where the court has granted a new trial for exceſſive damages in actions for *torts*.

Vide ante.

It was ſtrongly argued at the trial of this cauſe, that the jury were to meaſure the damages by what the defendant had ſuffered by this treſpaſs, and ſix days and an half's impriſonment; but this was thought a groſs abſurdity by the judge who preſided there.

Markham v. Middleton, Tr. 19 Geo. II. B. R. Per Curiam, the jury are the ſole judges of the damages in caſes of torts.

We deſire to be underſtood that this court doth not ſay, or lay down any rule, that there can never happen a caſe of ſuch exceſſive damages in *tort*, where the court may not grant a new trial; but in that caſe, the damages muſt be monſtrous, and enormous indeed, and ſuch as all mankind muſt be ready to exclaim againſt at firſt bluſh.

The nature of the treſpaſs in the preſent caſe is joint and ſeveral; and the plaintiff has ſtill another action againſt Lord *Halifax*, who,

it

it is ſaid, is more culpable than the defendants, who are only ſervants, and have done what he commanded them to do, and therefore the damages are exceſſive as to them: but we think this is no topic of mitigation; and, for any thing we know, the jury might ſay, " we will make no difference between the mi-" niſter who executed, and the magiſtrate " who granted this illegal warrant:" ſo the court muſt conſider theſe damages as given againſt Lord *Halifax*; and can we ſay that 1000l. are monſtrous damages as againſt him, who has granted an illegal warrant to a meſſenger, who enters into a man's houſe, and pries into all his ſecret and private affairs, and carries him from his houſe and buſineſs, and impriſons him for ſix days? It is an unlawful power aſſumed by a great miniſter of ſtate. Can any body ſay that a guinea *per diem* is ſufficient damages in this extraordinary caſe, which concerns the liberty of every one of the King's ſubjects? We cannot ſay the damages of 1000l. are enormous; and therefore the rule, to ſhew cauſe why a new trial ſhould not be granted, muſt be diſcharged. *Per totam Curiam.*

Hil. 8 Geo. II. B. R. Smith v. Boucher.

In treſpaſs and impriſonment, damages on a writ of inquiry 200l. *Skinner* moved to ſet it aſide for exceſſive damages; but *per Curiam*, in *tort* the jury are the proper judges.

Grey againſt Sir Alexand. Grant, Bart. a member of parliament, T. 4 G. III. C. P. 2 Wilſon 252. In a little aſſault and battery 200l. damages not exceſſive, and a new trial refuſed. Plaintiff and defen-

This was an action of aſſault and battery, tried at *Guildhall*, *London*, wherein the jury gave a verdict for the plaintiff, and 200l. damages; and now it was moved to have the verdict ſet aſide and a new trial, for exceſſiveneſs of damages. The caſe upon the evidence was as follows:

Captain

Captain *Holland*, of the ſhip *Nancy*, having brought from the *Weſt-Indies* a turtle for the plaintiff, Mr. *Grey*, and which was his property, and it having been, by miſtake, delivered to the defendant, the plaintiff went to him, and demanded it of him; but he ſaid he had invited ſome friends to dine with him upon it, and refuſed to deliver it, or to pay for it, and that the plaintiff might take his remedy; and pointing at the plaintiff, ſaid, "If *that man* was to aſk a turtle of me, I "would give him one;" the plaintiff anſwered and ſaid, this is very ungenteel; and the defendant ſhoved the plaintiff out of his houſe with his elbow; who thereupon aſked the defendant if he would waive his privilege of parliament, but the defendant refuſed to do it; plaintiff then ſaid to him, you are a ſcoundrel, and defendant gave him a blow upon the face, which cauſed a black eye; the plaintiff alſo demanded the turtle by a letter, and required the defendant to reſtore it; Captain *Holland* alſo informed the defendant, that the turtle had been delivered to him by miſtake, and deſired him to reſtore it; but the defendant ſaid, "*A turtle I have got, and what I* "*have got I will keep.*" The captain told the defendant, if he wanted a turtle to entertain his friends, there was one then at the *Jamaica* coffee-houſe to be ſold, and he might buy *that*; the defendant anſwered, "You may "buy it yourſelf, I will keep *that* I have got." Then the plaintiff ſaid to the defendant again, I come here to demand my right, and if you will not give it me, I will take my remedy at law, if you will waive your privilege; the defendant anſwered and ſaid, "In ſuch a trifling "buſineſs as this I will not waive my privi-

dant men of rank, and the latter had treated the former with great contempt.

" lege, but in a matter of property I would " waive it." One *Falconer* was called as a witneſs, to prove that he was preſent at this diſpute, and could not remember that any blow was ſtruck by the defendant; he had forgot every thing which made in favour of the plaintiff, but remembered every thing which made for the defendant; ſo it was a [illegible] caſt whether a blow was ſtruck or not: however, the jury found for the plaintiff, and 200 l. damages.

Curia. This was a quarrel between two gentlemen, and has been properly tried by a ſpecial jury of merchants of *London*, who are the proper judges of the damages. When a blow is given by one gentleman to another, a challenge and death may enſue; and therefore the jury have done right in giving exemplary damages. The plaintiff has been uſed unlike a gentleman by the defendant in ſtriking him, with-holding his property, and inſiſting upon his privilege; all of them tending to provoke him to ſeek his revenge in another way than by law: and therefore we think the damages are not exceſſive. Rule to ſhew cauſe why a new trial ſhould not be had, diſcharged *per totam Curiam.*

Gilbert *v.* Burtenſhaw, M. 15 Geo. III. B. R. Cowp. 230. In perſonal torts, the court will ſeldom grant a new trial for exceſſive damages. Malicious proſecution for perjury, and for words after the acquittal, charging plaintiff with the crime; 400 l. or 500 l. damages; new trial refuſed.

This was an action for maliciouſly indicting the plaintiff for perjury. The ſecond and third counts were for defamation, in ſaying the plaintiff was a perjured knave and ſcoundrel, (after acquittal,) and he would prove it.

Upon ſhewing cauſe why a new trial ſhould not be granted on the ground of exceſſive damages, it appeared by the report of Lord Chief Baron *Smythe*, before whom the cauſe was tried, that his Lordſhip directed the jury, in caſe they were of opinion that there was malice,

malice, and no probable cause, to find a verdict for the plaintiff; but if they thought there was a probable cause, then to find a verdict for the defendant. The jury found a verdict for the plaintiff, damages * 400 l. and his Lordship reported that he was very well satisfied with the verdict.

Mr. *Dunning*, Mr. *Lade*, and Mr. *Murray*, in support of the rule, were instructed to say, that the acquittal upon the indictment for perjury was by mistake, and not upon the merits; and in respect of the damages they insisted, that, as no special damage was laid or proved, the sum of 400 l. was much too severe and excessive.

Mr. Justice *Willes*, who tried the indictment against *Gilbert* the plaintiff, explained what passed at that time, and said, that, after a trial of six hours, it was an acquittal upon the merits, and very much to his satisfaction.

Lord MANSFIELD.—This rule comes before the court singly on the judge's report. It is not an application on the ground of surprise, or of new evidence, that has been discovered since the trial; nor upon the ground, which counsel were instructed to mention to the court, when it was first moved, namely, that, from the hurry of summing up, the jury were misled to think, that declarations accusing the plaintiff of perjury, were left to the jury, when, in fact, no such evidence was given. By the report it appears, that that suggestion is totally untrue, and that there was strong evidence of such declaration being made by *Burtenshaw*, after the trial of the indictment..

The verdict is taken upon two counts: upon the first, " for maliciously indicting the plain-

"tiff of perjury;" and upon the ſecond, for calling him "a perjured raſcal, and ſaying he "would prove it." There was evidence in ſupport of both counts. Therefore the whole ground of the application reſts on the point of exceſſive damages. I ſhould be ſorry to ſay that, in caſes of perſonal torts, no new trial ſhould ever be granted for damages, which manifeſtly ſhew the jury to have been actuated by paſſion, partiality, or prejudice. But it is not to be done without very ſtrong grounds indeed; and ſuch as carry internal evidence of intemperance in the minds of the jury. It is by no means to be done where the court may feel, that, if they had been on the jury, they would have given leſs damages, or where they might think the jury themſelves would have completely diſcharged their duty, in giving a leſs ſum. Of all the caſes left to a jury, none is more emphatically left to their ſound diſcretion, than in ſuch a caſe as this; and, unleſs it appears that the damages are *flagrantly outrageous* and extravagant, it is difficult for the court to draw the line.

But in this caſe, where the defendant has been guilty of repeated defamation againſt the plaintiff, after a fair trial and acquittal, upon a malicious proſecution, it is impoſſible for the court to go into a nice examination and admeaſurement of what ought to have been the damages.

ASTON, *Juſtice.*—I am clearly of the ſame opinion; and in the preſent caſe I ſhould doubt, even if it ſtood upon the ſecond count only, whether the court ought to interpoſe on account of the largeneſs of the damages, in favour of a man who has been guilty of charging another with ſo foul a crime as is there

laid,

laid, and declaring in public that he would prove it upon him.

Mr. *Justice* WILLES, and Mr. *Justice* ASHHURST, were of the same opinion.

Rule for a new trial discharged.

ACTION of assault. Verdict for 150l. *Mingay* moved to set it aside, on account of excessive damages.

Ducker v. Wood, T. 26 G. III. B. R. Durnford and East, 1 V. 277.

The court may in any case grant a new trial upon the ground of excessive damages.

Lord MANSFIELD said, there was no doubt but that the court had a power of taking the opinion of a second jury, in any case where the damages were excessive: but all these questions depended on their own circumstances, on which the court would exercise their discretion.

But in this case, upon hearing the report of the judge, the court thought fit to reject the motion (*a*.)

(*a*) Vide 2 Wils. 405. and 3 Wils. 62.

On a motion to set aside a writ of inquiry for *excessive damages*, it appeared that the plaintiffs were the indorsees of a bill of exchange drawn here by *G. Campbell*, for 2,800 star pagodas; payable to the defendant or order, and directed to *G. Mowbray*, Esq; at *Madras*. The plaintiffs discounted the bill, giving the then current price of the exchange, which was 6 s. 6 d. *per* pagoda. They sent it to *Madras*, from whence it was returned to *England*, protested for non-acceptance, and also for non-payment; on which the plaintiffs had demanded and recovered at the rate of 10 s. *per* pagoda, and 5 l. *per cent.* from the expiration of thirty days after notice to the defendant of it being returned.

Auriol and another against Thomas, Trin. Tm. 27 G. III. B. R. Durnford and East, 2 V. 52.

Where a bill indorsed over is not duly paid, the indorsee may charge the indorser with interest, exchange, and other incidental expences, beyond the amount of 5 l. per cent. if such charges are reasonable, warranted by usage, and not made a colour for usury. The charge of 10 s. per pagoda on a bill returned protested from India is not excessive,

Wood shewed cause, and contended that this could not be considered as an usurious demand, because the usage, as well as the par-

ticular agreement of the defendant, had been proved before the jury to charge at the rate of 10 s. *per* pagoda for bills returned from *India* protested, and 5 l. *per cent.* after thirty days notice to the defendant of non-payment, which included all incidental charges.

though it was taken in payment here at the rate of 6 s. and 6 d. per pagoda.

Philips, in support of the rule, cited the case of *Benson* v. *Parry* (*a*), where it had been held to be usury for country bankers to take more than 5 l. *per cent.* on inland bills payable at another place; and if the practice be contrary to law, no usage could make it good.

(*a*) Summer assises at Hereford, 1780.

(*b*) BULLER, *J.*—The case of *Benson* v. *Parry*, at *Hereford*, was determined on a mistake; but, when it was more maturely considered by this court, on a motion for a new trial, they were unanimously of opinion, that extra charges might be allowed, though they amounted to more than 5 l. *per cent.* if they were fair and reasonable, and not as a colour for usury; and there a new trial was granted. This doctrine was again recognized in two *Nisi Prius* cases, the one before the Lord Chief Baron *Eyre*, on the circuit, the other before me at the sittings at *Westminster* (*c*). So that it is now clearly settled, that the party is intitled to take not only 5 l. *per cent.* for legal interest, but also a reasonable sum for remitting, and other necessary incidental expences. The demand, in the present case, arises upon a bill of exchange, payable in *India*, which, if not paid there when due, would carry the interest allowed in that country; and it is admitted that the constant course with respect to bills returned protested from *India*, has been to allow at the rate of 10 s. *per* pagoda, which includes

(*b*) Ashhurst, J. was absent.

(*c*) Winch qui tam v. Fenn, Sitt. after H. 1786, B. R. That was an action for usury against the defendant, who was a country banker living at Sudbury. It appeared on the trial, that the practice was to discount bills in London for various correspondents at Sudbury, and for

includes intereſt, exchange, and all other charges. There cannot, therefore, be any colour for ſaying that this tranſaction is uſurious.

GROSE, *J.*—The ſame doctrine has been confirmed in the court of Common-Pleas; and the line which has been taken is, that, if the ſum charged be not a colour or a ſkreen for uſury, but is only fair and reaſonable, it ought to be allowed. This is like the caſe ſome few years ago, where *Indian* intereſt was allowed here on a bond given in *India* (a).

Rule diſcharged.

which they had 5 l. per cent. for the time the bills had to run; and they had alſo 5s. per cent. on the groſs ſum, without any reference to the time which the bill had to run: this commiſſion had been taken by the defendant on the bills in queſtion, and the jury found a verdict for the defendant under the judge's direction.

(a) Bodily v. Bellamy, 2 Burr. 1094.

VII. For insufficient Damages.

Anonymous. M. 10 W. III. B.R. 2 Salk. 647. New trial, or writ of inquiry, not granted for too small damages, unless where there is a trick. Here the plaintiff intitled to a specific sum, and the jury ought not to give less, except defendant proves something in mitigation.

IN covenant to pay a sum certain, *viz.* 100 l. and a grant that upon default it should be lawful for the covenantee to enter and take the profits; the defendant pleaded entry and *prisal del profits* in bar, and judgment was for the plaintiff, upon demurrer, and upon the writ of inquiry the jury gave damages, and upon motion a new writ of inquiry was awarded; for debt might have been brought upon this covenant; and this is not like an issue where the jury are to give no more damages than are proved: but here the jury are to give the *whole*, unless the defendant proves something in mitigation, which was not done in this case; therefore, the common rule holds, *viz.* that no new trial, or new writ of inquiry, shall be for too small damages, yet there being a contrivance in this case, it differs. *Vide* the next case.

Woodford vers. Eades et al. Eas. Tm. 7 Geo. II. 1 Stra. 425. The court set aside verdict for smallness of damages. Vide ante. Anon. Ca. from Salk. 647. The jury mistaken in point of law, in giving nominal damages, where plaintiff was intitled to real damages.

On a contract for stock between the plaintiff and *J. S.* they each deposit 200 l. in the hands of the defendant, and *J. S.* not performing his agreement, the plaintiff sues for the deposit, and had judgment on demurrer, and took out a writ of inquiry, and proved his case; but the jury, on a notion that the defendant could not pay out the money without consent of both parties, gave one penny damages; which was now set aside, the court saying, that the rule of not setting aside verdicts for the smallness of the damages, did not extend to this case, where

where the jury miſtook in point of law; and the Chief Juſtice ſaid he knew no reaſon why the court ſhould not interpoſe in the other caſe.

Hayward v. Newton. M. 6 Geo. II. B. R. 2 Stra 940. Verdict not to be ſet aſide for ſmallneſs of damages, where they are uncertain, as in action for words. Vide ante. Woodford v. Lades.

An action was brought for theſe words ſpoken of the plaintiff as a wine-merchant; "You "are a rogue, villain, and raſcal, and ſell by "ſhort meaſure;" and the jury gave twenty ſhillings damages: and though it was thought a hard caſe, yet the court ſaid it has always been denied to ſet aſide a verdict for ſmallneſs of damages, and therefore denied it in this caſe.

Barker v Sir Wolſton Dixie. 19 Geo. II. B. R. 2 Stra. 1051. No new trial for ſmallneſs of damages, the ſame being uncertain. A malicious proſecution. Vide ante Anon. Ca. et Woodford and Eades, et Hayward v. Newton.

In caſe for a malicious proſecution of an indictment for felony, the jury found for the plaintiff, and gave five ſhillings damages. And upon motion for a new trial, on account of the ſmallneſs of damages, the court held there could be no new trial on that account: for this was not a falſe verdict, as finding for the defendant would be, and would ſubject them to an attaint; whereas they having found rightly for the plaintiff, no attaint would lie. And new trials came in the room only of attaints, as a more expeditious and eaſy remedy.

Lord G——r v. Heath. T. 13 Geo. II. C. P. Barnes 445. In Scan. Mag. tho' only 12 d. damages given, the court refuſed to ſet aſide the verdict.

This was an action upon the ſtatute of *Scan. Mag.* for the following words ſpoken of the plaintiff; *G—d—m my Lord G——r, he is a rogue, and all on his ſide are rogues: if the mob would ſtand by me, I'd drive them all, or lay the town in heaps.* The words were proved upon the trial, notwithſtanding which the jury only found twelve-pence damages. *Darnel*, for plaintiff moved to ſet aſide the verdict, by reaſon of the *ſmallneſs* of the damages; but not being able to produce any inſtance of a verdict's being ſet aſide, merely for that reaſon, though for *exceſſive* damages verdicts have been

frequently

frequently set aside, and in point of reason there is the same cause for setting aside one as the other; yet as the difference hath been always taken, and practice long settled, *per cur.* we can make no rule.

Tutton v. Andrews. T. 14 & 15 Geo. II. C.P. Barnes 448. Inquisition set aside, and new inquiry granted, the sheriff having admitted defendant to give improper evidence, whereby the damages were lessened.

The sheriff, on the execution of a writ of inquiry of damages, admitted improper evidence to be given by defendant, whereby the damages were lessened; the court ordered the inquisition to be set aside, and gave plaintiff leave to execute a new writ of inquiry. A notion has prevailed, that where damages are excessive, a new trial, *&c.* may be granted; but not where damages are less than they ought to be, though there is as much reason for a new trial, *&c.* in the one case as the other. *Burnett*, for plaintiff; *Gapper*, for defendant.

Russell v. Ball, in assumpsit E. 18 Geo. II. Barnes 455. Money paid into court. Plaintiff did not take it out. Tried cause. Recovered only sum paid in. Motion to set aside verdict on two grounds. 1st, One of the jury summoned did not appear, but his son, who was sworn. 2d, Damages too small. Verdict set aside on the first ground, not on the second, this being a case of uncertain damages.

Defendant paid twenty-five pounds into court on the common rule; plaintiff refused to accept the money, proceeded to trial; and on a full hearing of the merits, had a verdict for 25 l. the exact sum paid into court; in consequence whereof, plaintiff, not having recovered more, was, by the rule, liable to pay costs to defendant; to avoid which, plaintiff moved to set aside the verdict; objecting, that the cause was tried by eleven jurors only. It appeared that one *John Pearce*, summoned on the jury, did not appear, but his son of the same name, not qualified, attended the assizes, and when the father was drawn, and called, answered for him, and was sworn on the jury.

Plaintiff also objected to the smallness of the damages found. *Per cur'*. Attaint will not lie against jurors for finding too small damages. Where a demand is certain, as by promissory note, the court will set aside a verdict for too small

ſmall damages, but not where the damages are uncertain; as in this caſe, for curing a wound. But the verdict by eleven jurors only is no verdict; it is null and void.

Rule abſolute to ſet aſide the verdict, without coſts. *Vide Norman* againſt *Beaumont, Mich.* 18 *Geo. II.*

Poſt IX. (4.)

Belfield, for plaintiff;

Draper, for defendant.

Qu. If a caſe, nearly ſimilar, hath not lately been determined in *B. R. contra.* Here were 12 jurors.

Hibbert and others againſt Carter. E. 27 Geo. III. B. R. Durnford and Eaſt 1 V. 745. The indorſement and delivery of a bill of lading to a creditor, primâ facie conveys the whole property in the goods from the time of its delivery. But if the intention of the parties appears to have been only to bind the net proceeds in caſe of the arrival of the goods, then an inſurance made on account of the indorſer, after ſuch indorſement, is good. This a queſtion of law, how much plaintiff was intitled to, and the motion was to ſet aſide the verdict, for that the jury, as plaintiff contended, had given him much leſs than he was intitled unto.

This was an action upon a policy of inſurance on goods, on board the ſhip *Devonſhire*, at and from *Jamaica* to *London*, which inſurance was ſtated upon the head of the policy to be made "*on account of Robert Kerr, eſq*; The plaintiffs were merchants in *London*, and the general conſignees of *Kerr*, who was a planter in the iſland of *Jamaica*. They were in the conſtant habit of procuring inſurance upon his goods, as ſoon as they received advice of their being ſhipped. On the 2d of *December*, 1782, the plaintiffs received advice from *Kerr* of having ſhipped ten hogſheads of ſugar on board the *Devonſhire*, in which letter, dated 18th of *October*, 1782, was contained a general direction to inſure whatever goods were ſhipped by him. The inſurance was immediately effected, but in the month of *November*, between the time when the order was ſent, and the time when the defendant ſubſcribed the policy, *Kerr* had indorſed the bill of lading to one *Dellpratt*, in *Jamaica*, to whom there was an arrear of intereſt due upon mortgage on *Kerr*'s eſtate in that iſland. The plaintiffs had notice of this indorſement, after the inſurance was made, by a letter from *Kerr* to them, wherein

wherein he informed them, that he had been obliged to aſſign the bills of lading for the net proceeds to *Dellprat*. The bill of lading, as it originally ſtood, expreſſed the ſugars to be ſhipped *on account* and *riſk* of the ſhipper, and directed the delivery to his order, or that of his aſſigns: the indorſment was in the following terms; "deliver the above ſugars to Mr. "*John Hodgſon*, for account of *S. Dellprat*;" ſigned "*Robert Kerr*." The ſhip was loſt in the courſe of the voyage.

At the trial of this cauſe at the laſt ſittings at *Guildhall*, before *Buller*, J. the plaintiffs reſted their caſe here, and contended that upon theſe facts they were entitled to a verdict for the amount of the inſurance. On the other hand it was objected, that *Kerr*, having aſſigned the bill of lading before the inſurance was actually effected, the averment in the declaration that theſe ſugars had been inſured *on his account* was not true, for he had not then any inſurable intereſt remaining in him, the entire property in the goods having paſſed out of him by the aſſignment of the bill of lading, which operated in this inſtance as a payment; and *Buller*, J. being of this opinion, upon the general ground that the indorſement of a bill of lading paſſed the whole property, would have non-ſuited the plaintiffs; but it appearing that the defendant had neglected to pay the premium of twenty guineas into court, the plaintiffs took a verdict for that ſum.

Upon a motion on the part of the plaintiffs in this term for a new trial,

Erſkine and *Eaſt* contended that the verdict ought to have been taken for the whole ſum inſured. The indorſement of the bill of lading only bound the conſignment of the goods in *England*,

England, and cannot be taken to have transferred the whole property out of the consigner in the mean time. He was answerable again to *Dellprat* for the amount of the sugars, in case they did not arrive safe; the bill of lading was put into his hands merely as a collateral security for the debt; he was only to receive the net proceeds; and therefore it cannot be said to be a payment upon the spot, for it is not certain what the net proceeds will be. If so, there did remain an insurable interest in the consigner, for he was to run the risk of the voyage. The case of *Caldwell* and *Ball* (*a*) went no farther than to determine that the indorsement of a bill of lading bound the consignment.

(*a*) Durnford and East. 1 V. 205. Vide ante V.

The principal dispute between the parties was, who should get the consignments of an estate in the *West-Indies*. It is evident from the very terms of this bill of lading, that the risk of the voyage was to be run by the shipper; for, upon the face of it, the goods are expressed to be shipped "*on account*" and "*at the risk of the shipper*;" and the indorsement only directing the *delivery* to be "*on account*" of another person, leaves the *risk* as it was before. But, admitting that by the general law, the indorsement of a bill of lading does transfer the whole property out of the consigner, yet the consigner may recover from the underwriter, as a trustee for the person really entitled. This doctrine seemed to be admitted in the case of *Delaney* and *Stoddart* (*b*), which was stronger than the present; for there, there had been an actual sale of the ship insured between the time of sending the order for insurance, and the time when the insurance was actually effected; and there, the action was

(*b*) Durnford and East. 1 V. 22.

was held to be ſuſtainable againſt the underwriter, in the name of the vender, though in reality for the benefit of the vendee; ſo here, perhaps, the inducement for taking the bill of lading, if it is to be conſidered as an abſolute transfer of the property, was the idea of ſecurity, from the goods being inſured.

The court, however, upon this occaſion, were clearly all of opinion, that where a bill of lading is taken by a creditor, as a ſecurity for his debt, on his own account, the whole property paſſes by the delivery, and is to be conſidered as a ſatisfaction of the debt *pro tanto*. That the parties were always at liberty to vary from the general rule, by entering into any particular agreement between themſelves; but that muſt be ſhewn, in order to take advantage of it. They conſidered the caſe of *Caldwell* and *Ball* as deciding the general queſtion. And as to the caſe of *Delaney* and *Stoddart*, there was an agreement that the policy ſhould be transferred.

Vide ante V.

They therefore refuſed the rule.

But afterwards, on a ſubſequent day, the motion was renewed, by leave of the court, on an affidavit ſtating the particular tranſaction between the parties.

That *Kerr* had no intention whatever of paſſing the whole property by the indorſement of the bill of lading; his intention being no more than to bind the conſignment of the goods in *England*; to which purpoſe he had ordered his correſpondents to pay the *net proceeds* to *Dellprat*, as appears by the letter before-mentioned; and that ſince that time *Kerr*'s executor had actually accounted to *Dellprat* again for the amount of the ſugars which had been loſt, a demand

a demand having been made on them to that purpose.

A rule was now granted to shew cause why there should not be a new trial; which was afterwards made absolute, without hearing either side (*a*).

Verdict for the plaintiffs (*b*).

(*a*) The cause came on to be tried a second time at the sittings after *Easter* term, at *Guildhall*, when, the same clear evidence of the intention of the parties being given, as had been set forth in the affidavit laid before the court, Mr. *Justice Buller*, was of opinion, that the plaintiff was entitled to recover the amount of the insurance. He said the general doctrine was clear, that the indorsement of a bill of lading *primâ facie* transferred the whole property in the goods, but this was subject to be controlled by the evident intention of the parties. Here advice was sent by the consigner to his correspondents at home, that he had been obliged to give the bill of lading to *Dellprat*, for the *net proceeds*, and the amount of the goods was actually accounted for again by *Kerr*'s executors to *Dellprat*, after the loss was known. And besides, what was material to be observed, no value had been put upon the goods at the time, which shewed that *Dellprat* was only to have the *net proceeds*.

(*b*) *Vide Godin* v. *the London Assurance Company*. *Vide ante*, *L. E.* 197.

VIII. Re-

VIII. Refusing of Evidence by, or Mis-direction, or Non-direction of the Judge.

Vide post IX. (12.) (*a.*) *Rex* v. *Amery*; *and* IX. (16.) *Buckley* v. *Buckley*.

Bignall v. Devenish. M. 3 Ann. B. R. 6 Mo. 242. The judge refusing legal evidence.

Per cur. Good cause of new trial, where the judge, who tried the cause, has denied to admit that for evidence, which was legal evidence.

Thomkins v. Hill, M. 1 An. B. R. 7 Mod. 64. Judge allowing or over-ruling evidence, which he ought not to have done.

It was agreed by the court, that if any judge of *nisi prius* allow, or over-rule evidence which he ought not to have done, upon application to the court, they will grant a new trial; for all writs of *nisi prius*, are under the control of the court out of which they issue.

Anon. M. 1 An. B. R. Salk. 649. S. P. Farell. 53, 64. v. 6 Mod. 222, 242. Mis-direction.

A new trial shall be granted, if the judge of *nisi prius* mis-direct the jury, because those trials are subject to the inspection of the court, *per Holt, C. J.*

Taylor, Clerk, v. Walker. Pas. 1729. Excheq. Bunb. 267. Upon an issue to try a modus of 3 s. 4 d. for five closes, it appeared in evidence, it extended to two more. New trial granted, because the judge mis-directed the jury.

Bill was preferred by the plaintiff, as rector of *Checkley*, in the county of *Stafford*, for tithes of five closes in that parish, in the defendant's possession.

The defendant by his answer, insisted, that there was a *modus* of three shillings and fourpence, in lieu of all tithes arising on the five closes, and that no tithes in kind were ever paid: upon the hearing the court directed an issue to try the *modus*, and upon the trial it appeared in evidence, that this *modus* was payable

payable not only for the five closes, but two closes more particularly named; Mr. Justice Probyn, upon this evidence (at Stafford) directed the jury, who accordingly gave a verdict for the plaintiff against the *modus*. Now, upon the return of the *postea*, it was moved for a new trial; for that this being an issue to inform the conscience of the court, the defendant ought not to be held so strictly to proof, especially, since no proof of tithes in kind being paid was given; and therefore, though it extended to two closes more, yet it was less than really the prescription was, which he insisted on, and therefore he ought to have had the benefit of the proof, as to five closes only. For the plaintiff it was insisted, that a *modus* ought to be certain, being in bar of common right, and therefore he has failed in the defence he insisted on; and Mr. Justice *Probyn*'s opinion, as certified by Baron *Hale*, was relied on: but *per totam curiam*, a new trial was granted: and they said they could not distinguish this from the case of a prohibition, and cited these cases; *Hetley* 111. 1 *Vent.* 32. *Hob.* 64. 1 *Sho.* 347. 4 *Mod.* 89. *Carth.* 89. *Cro. Eliz.* 531, 722.

Selman v. Courtney. T. 13 and 14 Geo. II. Barnes 446. In trespass, defendant pleaded not guilty, and would have given evidence that the locus in quo was the king's highway. The judge refused to admit the evidence. Verdict for plaintiff. Motion for new trial, but refused.

This was an action of trespass, *quare clausum fregit*. Defendant pleaded not guilty; and upon the trial before Mr. Baron *Carter*, defendant offered to give in evidence, that the place in which, &c. was the king's highway; but the judge refused to admit that evidence to be given, and plaintiff recovered a verdict. Defendant moved for a new trial, and a rule to shew cause was granted, on payment of costs. Upon shewing cause, several cases were cited on both sides. And it being said, that some judges in the circuit had been of different opinions,

Majority

Majority of the judges of opinion such evidence could not be given upon the general issue.

opinions, with respect to this point, the court thought it a matter of so much consequence, that it was proper to be considered by all the judges. After a consultation, the Chief Justice declared it to be the opinion of a great majority of the judges, that an highway ought not to be given in evidence under the general issue; but ought to be pleaded specially; and the rule to shew cause was discharged.

Skinner and *Prime*, for plaintiff; *Belfield* and *Urlin*, for defendant.

Cases cited for plaintiff, *Watson* against *Sparks*, 1 *Salk*. 287. *Sid*. 106. *Doct*. *Placitandi* 197. *Crogate*'s case, 8 *Co*. 66. *b*. 1 *Inst*. 303. *b*. 5 *C*. 805. 6 *Mod*. 66.

For defendant, *James* against *Hayward*, *Cro*. *Car*. 184. *Morse* against *Bennett*, 9 *G*. *B*. *R*. 2 *Ventris* 297. and in *Shower*.

Absolon against Knight and Barber, in replevin. E. 16 Geo. II. Barnes 450. Avowry for rent, in arrear, and issue thereon, with a notice of set-off. The judge rejected the evidence. Verdict for avowant. Motion for new trial, refused, the evidence being properly rejected.

Avowry for rent in arrear, and issue thereon. Plaintiff had given notice with his plea in bar, to set off a mutual debt against the rent, and offered to give evidence of it at last *Berks* assises, before Mr. Justice *Denison*, who refused to admit the same. The question was, whether such evidence ought to have been received or not? And the court were of opinion, that such evidence was properly rejected. This case is neither within the letter nor the intention of the statute. The issue is special and not general. It is not an action upon a personal contract. The rent savours of the realty, and the remedy is by distress. Replevin is a mixed action. The judgment, if for the avowant, must be a return of the cattle. To take the benefit of the statute, plaintiff and defendant must plead properly. In debt on bond, defendant cannot set off under *non est factum*, or *solvit ad diem*; but must plead specially.

Qu. If a set-off could have been pleaded in this case.

ſpecially. Perhaps by way of ſpecial plea to the avowry, plaintiff might have pleaded a mutual debt of more than the rent. There could not have been a ſet-off by defendants under *non cepit*; nor can there be for plaintiff under *riens* in *arrere*. The rule to ſtay the entry of judgment upon the verdict for the avowants was diſcharged. *Belfield* and *Agar*, for plaintiff; *Skinner*, for avowants.

Monday, 11th February, 1760. Foxcroft et al. aſſignees of William Satterthwaite, a bankrupt, v. Devonſhire et al. H. 33 G. II. B. R. 2 Burr 931. Defendants factors to the bankrupt, had the goods conſigned to them. Sold the goods and paid money upon the bankrupt's drafts. Action for money had and received, claiming all the money ariſing from the ſale, except commiſſion and charges. Defendants claimed allowance for money paid, &c. A ſecret act of bankruptcy proved by plaintiff, which over-reached conſignment and ſale. Defendants contended they had not notice of the act of bankruptcy, and inſiſted on their claim under 19 Geo. II. c. 32. Plaintiff contended

This matter came before the court, upon a motion for a *new trial*, on the ground of a *miſ-direction* by the judge who tried the cauſe.

It was an action upon the caſe, upon an *indebitatus aſſumpſit*, brought by the plaintiffs againſt the defendants, for monies had and received by the defendants, to the uſe of the plaintiffs, as aſſignees of the bankrupt: to which the defendants pleaded the general iſſue, " that they did not undertake, *&c.*" and iſſue was joined thereon.

The cauſe was tried at the *Lancaſter* aſſiſes, before Mr. Juſtice *Noel*. A verdict was found for the plaintiffs: and the judge declared himſelf *ſatisfied* with the verdict.

It was admitted at the trial, on the part of the defendants, " that *Satterthwaite* was a " *trader*:" the *debt* of the petitioning creditor was alſo admitted, and ſo were the *commiſſion* and the *aſſignment*; but they diſputed the *act of bankruptcy* ſuppoſed to have been committed by *Satterthwaite*.

The action was brought for money ariſing from the ſale of goods, conſigned by *Satterthwaite* to the defendants, as FACTORS for him, (which they had long been,) and ſold by them as ſuch; which money was admitted to be in the hands of the defendants, and amounted to 5314 l. 17 s. 9½ d.

tended the transaction, as to payments, &c. was fraudulent, and therefore defendants precluded from entering into the merits, &c.

The judge left it to the jury upon the preliminary point of fraud, who found the transaction fraudulent; upon this defendants moved for a new trial. Court of opinion the conclusion drawn by the jury was wrong. New trial granted.

The defendants, on the other hand, had paid several sums of money upon *Satterthwaite*'s drafts, and otherwise, to his use, and upon his account.

The plaintiffs at the trial, proved some *secret* acts of bankruptcy, by his being denied to his creditors about *Christmas*, 1751: after which, he appeared again publicly as usual, 'till about the month of *August* following; (as was proved on the part of the defendants.) In *August*, 1752, he totally stopt payment: and thereupon, the commission was taken out; these *secret acts of bankruptcy*, at *Christmas*, 1751, *over-reached the consignment* to the defendants, the *sale*, and the *time when the money was advanced* by them to the use and order of the bankrupt. And the counsel for the plaintiffs produced a series * of letters from the defendants to *Satterthwaite*, which fully proved, as they alledged, " that the defendants were " *privy to his insolvency* at the *time* when they " advanced the money to his use and order."

The counsel for the defendants would, at the trial, have entered into the two following points; *viz.* 1st, Whether the defendants were not intitled, *as* FACTORS for *Satterthwaite*, to *retain* for the *general balance* of their account: 2dly, Whether they were not within the *protection of the statute of* 19 *G. II. c.* 32. §. 1. which, after reciting " that bankrupts frequently commit *secret* acts of bankruptcy " *unknown* to their creditors, and other per- " sons with whom, in the course of trade, " they have dealings and transactions; and " after the committing thereof, *continue* to ap- " pear publicly and carry on their trade and " dealings, *&c.* and after reciting that the " permitting such *secret* acts of bankruptcy, " to

* See these letters verbatim, p[illegible]t.

"to avoid and defeat payments *really and* "*bonâ fide* made in the cafes, and under the "circumftances before-mentioned, where the "perfons receiving the fame *had* NOT *notice of* "*or were privy to* fuch perfon's having com-"mitted any act of bankruptcy, would be "a great difcouragement to trade and com-"merce, and a prejudice to credit in general;" enacts, "that no perfon who fhall be *really* "*and bonâ fide a creditor* of any bankrupt, for "or in refpect of any *bill or bills of exchange*, "*really and bonâ fide* drawn, negociated, or "accepted, by fuch bankrupt, in the *ufual* "*and ordinary courfe of trade and dealing*, fhall "be liable to *refund or repay* to the affignees of "fuch bankrupt's eftate, any *money* which be-"fore the *fuing forth* of fuch commiffion was "*really and bonâ fide* and in the *ufual and ordi-*"*nary courfe* of trade and dealing, *received by* "*fuch perfon of any fuch bankrupt*, before fuch "time as the perfon receiving the fame fhall "*know, underftand*, or *have notice* that HE is "*become* a bankrupt, or that HE is in *infolvent* "*circumftances*."

But the counfel for the plaintiffs objected, "that this tranfaction of the defendants was "FRAUDULENT; for that they plainly *knew* "and were *apprized* that *Satterthwaite was* "*infolvent* at the *time* when the effects came to "their hands."

The jury were of this opinion; and gave a verdict for the plaintiffs, for the *whole* money, except *commiffion* and *charges of fale*.

This *previous* point concerning the FRAUD having been ftrongly infifted upon by the counfel for the plaintiffs, at the trial, the counfel for the defendants were thereby precluded from entering into *other* points, which they thought

to be material for their clients, and which they said they were otherwise ready to have entered into at that time. Upon this preclusion they grounded their present motion for a new trial: for they alledged that the jury had founded their verdict upon *wrong conclusions* drawn from the evidence, and upon a *mistake of the law*; and that the defendants had been unjustly precluded from entering into the two preceding points, or any thing else that might have been material to their defence.

And they now insisted, 1st, That the defendants had a GENERAL *lien*, as *factors*, upon the bankrupt's goods consigned to them; 2dly, that they were *purchasers* of them for a *valuable consideration, without notice* that *Satterthwaite* was become a bankrupt, or in insolvent circumstances; 3dly, That in *this* action (upon an *indebitatus assumpsit*,) it is not in the power of the assignees, to affirm the contract *in part*, and deny it *in part*; but if they *affirm it in part*, they affirm it *in toto*. Now here, they *do affirm it in part*; they affirm part of their conduct, *as factors*: therefore they *cannot disaffirm* the rest of their conduct as *factors*.

They said that the present verdict would not stand in their way; because FRAUD is a *conclusion* of LAW, from facts: and therefore the *court*, and *not the jury*, are the *proper judges* "*what* facts do import fraud," and "*what* "facts do not import fraud." And they denied that the letters, or any part of the facts given in evidence were at all *unfair*: at least, it could never be said, "that they supported a con- "clusion of fraud."

This case was argued on *Thursday*, 24th *January* last, by Mr. *Norton*, for the plaintiffs, who shewed cause against setting aside the ver-

dict and granting a new trial, upon payment of costs; and by Mr. *Winn*, *e contra*, for the defendants, who had moved for a new trial.

The court having taken time to consider it,

Lord MANSFIELD now delivered their resolution.

This matter came before the court, upon a motion for a *new trial*, on the ground of a *misdirection* by the judge who tried the cause.

It was an action upon the case upon an *indebitatus assumpsit*, for monies had and received by the defendants, to the use of the plaintiffs, as assignees of the bankrupt. The defendants pleaded the general issue, and the cause was tried at *Lancaster* assises, before Mr. Justice *Noel*.

It was admitted at the trial, that *Satterthwaite*, the bankrupt, was a trader: and the debt of the petitioning creditor, the commission, and the assignment, were likewise all admitted.

The action was brought for monies arising from the sale of goods which had been consigned by the bankrupt to the defendants, as factors for him, and sold by them as such; which money was admitted to be in the defendants hands, and amounted to 5314l. 17s. 9½d.

It appeared that the defendants had paid several sums of money to *Satterthwaite's* use, upon bills drawn upon them by him, and otherwise.

The plaintiffs (the assignees under the commission) *proved some* SECRET *acts of bankruptcy* to have been committed by *Satterthwaite*, about *Christmas*, 1751; namely, his being denied to his creditors. On the other side, it was proved that he soon *appeared again publicly as usual*; and continued to do so, 'till about the month

 of

of *August* following, (1752); but in *August*, 1752, he ftopt payment, and thereupon the commiſſion was taken out.

Theſe ſecret acts of bankruptcy, committed at *Chriſtmas*, 1751, *over-reached the conſignment* of the goods, the *ſale* of them, the *receipt* of the monies for which they were ſold, and likewiſe the *time when the defendants advanced the monies*, to the uſe and order of the bankrupt.

It was inſiſted by the counſel for the defendants, that from the nature of the preſent action, an *indebitatus aſſumpſit*, the defendants, being FACTORS, ought to be allowed not only for their commiſſion and all charges and expences, but alſo *whatever money they had paid on account* OF BILLS *drawn upon them by Satterthwaite:* and that the plaintiffs in this action could only recover the BALANCE of the *general* account.

The counſel for the plaintiffs admitted that the defendants were intitled to be allowed their *commiſſion* and all *charges* and *expences*, as factors: but *not the bills of exchange* drawn by *Satterthwaite*, which they had paid *ſubſequent* to the *act of bankruptcy*.

This *queſtion* was agreed to be *reſerved*, (if it ſhould be neceſſary to have recourſe to it,) as a point for the future conſideration and determination of the judge who tried the cauſe.

But the counſel for the plaintiffs inſiſted on a *preliminary* point; *viz.* "That the defen-"dants were guilty of a FRAUD, in paying "theſe bills of exchange drawn upon them by "the bankrupt:" which *preliminary* point of FRAUD was ſufficient to *deſtroy* any right that the defendants might *otherwiſe claim* (ſuppoſing the tranſaction had *not* been fraudulent,) *to an allowance of the money paid in diſcharge of them*;

and,

and, consequently, to *preclude* them *from entering at all* into the *question above-mentioned.* For if it should be admitted on the part of the plaintiffs, "that this action of *indebitatus* "*assumpsit* affirmed the contract," yet if their payment of the bills was *fraudulent*, it would at once put an end to their claim of an allowance of the money as *fraudulently* paid. They granted, that, in case the defendants should appear *not* to have been guilty of any fraud, but to have paid the bills fairly and honestly, they would then have a right to enter into the point reserved (as above) for future consideration.

But they insisted that, upon supposition that in a *common* case, this sort of action *would confirm the contract*, so as to make the consignment, sale, and payment of the bills, to be considered as *before* any act of bankruptcy committed, and, consequently, that the defendants would be *intitled to retain what they had paid upon the bills*; (for every thing that could be alledged by the defendants, must, *pro hac vice*, be *admitted*, upon a previous bar to their going into the question;) yet the bar of FRAUD would *destroy* any demand they could have upon that account.

And the FRAUD which they *charged* upon the defendants was this, "That they were "PRIVY to *Satterthwaite*'s insolvency, at the "*time* when they advanced the monies to discharge his bills."

Upon this *preliminary* point *only*, OF FRAUD, it was left to the jury: and, upon *this* point *only*, they found their verdict. Upon hearing all the evidence, they were of opinion, "That "the transaction *was fraudulent* on the part "of the defendants;" and they gave a verdict

dict for the plaintiffs, for the whole money, deducting only the commission due to the defendants, and the expences of the sale of the goods.

Though the *ground* of the verdict should be wrong, yet if it clearly appeared to us *now*, " that, upon the whole, *no injustice* had been " done to the defendants;" or if it clearly appeared to us *now*, " that the plaintiffs, by " *another form of action*, could recover all they " have got by this verdict;" we think the court ought not to grant a new trial. But if *injustice* be done to the defendants, by the present verdict, and if it be *not* certain and clear " that the plaintiffs might have equal redress, " and recover as much by *another form of action*," then we ought to grant a new trial.

Two points have been argued, and urged on the part of the plaintiffs.

First collateral point.

1st, That clearly the defendants were not to be allowed to retain for the bills: because, (1st,) They were not paid 'till *after* an act of bankruptcy; (2dly,) *This* action (of *indebitatus assumpsit*) only admits the sale of the goods, and nothing else, but the agency of the defendants in *that* single respect; and, (3dly,) *If* it admitted *every* thing, so as to put the assignees in the very condition the bankrupt would have been, had *he* brought this action, yet a *factor* has *no lien* for items of a * *general* account, (his lien being confined to his *commission* and *expences* about the particular goods.)

* Vide 1 Burr. 494.

These points have not been at all considered in this action: and, therefore, it is enough if they are *doubtful*. They went off upon the preliminary question of the *fraud* being taken up and pursued, and were never afterwards

taken

taken into any further confideration at the trial.

We are not clear that this action of *indebitatus affumpfit* does not affirm the power of the bankrupt and the contract, throughout the *whole* tranfaction. Where fuch an action is brought by affignees of a bankrupt's effects againft a *vendee* of goods, it affirms the fale, and alfo the *payment to the bankrupt* of any part of the price. It is agreed here, that it admits the *confequence* of the defendants being factors, and allows a lien for *commiffion* and *expences*.

" That a *factor* has alfo a *lien* upon goods " configned, (*whilft* they *remain in his poffef-* " *fion*) for ITEMS of a *general* account with " his principal," has been folemnly * determined. However, the prefent cafe differs from the cafe of *Krutzer* v. *Wilcocks*, where it was fo determined: for there, the factor *remained in poffeffion of the goods*; but here the goods have been *fold*, and turned into *money*. In *fuch* a cafe, there never was a doubt but that *mutual items* of account might be fet off; the demand and recovery can only be for the balance. Therefore it is impoffible to fay, that the queftion the defendants would have made upon this point, had they been permitted, *may* not be very material. And if it *might* have been material to their defence, they have a right to have it tried and confidered.

* In the cafe of Krutzer v. Wilcocks.

2dly, Another matter gone into at the trial, and urged by the counfel for the plaintiffs, was, " That, in an *action* of TROVER, the " plaintiffs might certainly recover the value " of the GOODS, *without* making *any al-* " *lowance*."

Second collateral point.

Mr.

Mr. *Winn* convinced me, that it would depend upon a variety of circumstances, (some of which he offered to lay before us by affidavit,) which were not gone into at the trial, because the counsel for the defendants were stopped and cut short, by the preliminary bar of the fraud, which was alone sufficient to invalidate their claims as upon a fair transaction.

I do not choose to say more particularly what may possibly assist the defendants in an action of trover, because I would not prejudice the matter: it is enough to say, " it does " not sufficiently appear to us, that they could " make *no* defence to an action of trover."

Principal point.

This makes it necessary to examine the GROUND *of the verdict*, which proceeded from the direction given.

I will admit, " that the evidence proved " the fact, and every conclusion deducible " from it:" but I cannot think that the fact so proved, or conclusion so drawn, amounts to that offence which the law calls FRAUD, to avoid the debt. And in examining this matter, we must remember, that, *pro hac vice*, the whole transaction is admitted to be *before* any act of bankruptcy.

Mr. *Norton* rightly said, " that *fraud* is " *sometimes* mere matter of fact; and *some*" *times*, the conclusion of law from facts."

So is high treason. Levying war is mere matter of fact: compassing the death of the king, is a legal conclusion from facts. So it is almost as to every other offence.

Fraud often is a *mere fact*; as when it depends (as on a policy of insurance, for instance,) upon what the party said or did; or it may be, and often is, a question of *law*.

Suppose

Suppose a creditor, *knowing* a trader likely to break, *conceals* it from the knowledge of other creditors, 'till he gets, even by threats of legal process, payment of his debt *before* any direct act of bankruptcy, and the assignees should insist this was a fraud, and that he should refund: this is a matter of *law*; and the *law* would say "that this was *not* fraudulent."

Suppose a man, *bonâ fide*, lends money to a trader upon a *mortgage*, after an act of bankruptcy *without* notice, and *then knowing* of the commission of bankrupt and assignment, gets in an old term, even for little or no consideration, and the assignees bring an ejectment, and it becomes a question, "whether "this be a fraud, or not;" this is a matter of *law*: and the law will say "it is *no* fraud;" for the mortgagee had a right to do this.

The evidence of fraud in *this* case, as stated by the report, are the following letters:—The first is dated *Bristol*, 5th *May*, 1752, signed "*Devonshire* and *Reeves*," and directed to *William Satterthwaite*.

"We wish you had been *open*, and *told us* "*in time* how your affairs stood.—It appears "to us very evidently, you have risqued your "reputation and credit on the faith of those "S. Do but consider where you must have "been in point of reputation, had we done otherwise than we did.—It is now over; "and we will not do any thing that should lessen your credit—therefore ship not an "ounce of goods more, 'till your affairs are "settled."

The next letter is dated *Bristol*, 15th *May*, 1752, signed "*Devonshire* and *Reeves*," and directed to *William Satterthwaite*, merchant in

Bristol,

Bristol, and contains the following passage:—
" We cannot help being uneasy to think you
" have drawn on us again for 120 l. Really
" you will make us let your bills *go back*
" *protested*, in spight of our inclinations. We
" will pay this; but take notice—*don't draw*
" *another*: we friendly hint it."

The next letter is dated 25th *June*, signed and directed as above, and is thus:—" *William Satterthwaite*, esteemed friend—We
" really *fear* these proceedings will *greatly hurt*
" *your credit* in the eyes of every judicious
" person: it is very natural to think that will
" be the consequence. For our part, we
" would make a thousand shifts, rather than
" trifle with our reputation, as you do with
" your's—it's a matter well worth your serious consideration.

" P. S. Inclosed we return you *Liebenrood*'s
" draft 150 l. which, with one shilling postage, place to our credit. This is such a
" thing we never did before, nor ever will
" again."

The next letter is dated 27th *June*, 1752, signed as before, and directed to *William Satterthwaite*. After referring to the last, it goes on thus—" In this last letter, thee mentioned
" nothing of remitting for *Liebenrood*'s bill,
" which thee ordered us to send for from *London* four days before due, (which we did,
" and returned thee in our last,) though thee
" promised us faithfully to remit for the same,
" last sixth day was a week, and having had
" sundry letters that take no notice thereabout,
" we cannot help thinking and saying that
" thee *trifles with thy creditors and us*. We
" are so much in want of money *as thee canst*
" *possibly be*; and had we thought thee wouldst
have

" have treated us in this manner, we would " not have advanced one quarter of the ſum, " to be allowed 10 l. *per cent.* The diſap- " pointment to us gives more uneaſineſs than " all the profits of a year's trade will do us."

The next letter is dated 14th *July*, the ſame year, and ſigned as before; and is as follows:— " *William Satterthwaite*, Eſteemed Friend, So " much for your affairs in and under our care, " which ſhall be managed with all care and " frugality.

" But what next we ſay, *appears to us in a* " *very odd light*—For *Edward Wilcox* has been " with us, and ſays you have *made over our* " *goods* on the *Sarah* and *Martha.* If true, " gives us *ſuch ideas that we dare not put pen* " *to paper to ſay our ſentiments.* If you ſend " us any more bills—if ever we do return a " bill, we *will return your's.*"

The next letter is the 28th *July*, the ſame year, ſigned as before, and is as follows:— " *William Satterthwaite*, — The *Sarah* and " *Martha*, your ⅜ths. The *Carolina*, how " much? Tell us: for *you muſt ſecure us, by* " *a bill of ſale of each,*—that is your parts— " unleſs you ſend here ſome *ſecurity.*—Say, " your father *Moſs*—join in a bond, or ſome " good man. Claimants will call upon us, " for their proportions of cargoes we have " ſold; as *Touchetts* did of the rice. We are " wil ing to ſtand by you as far as we can with " prudence: but *an undoubted counter-ſecurity* " *we muſt have*—*we dread the conſequences* of " theſe repeated ſtrokes—we *very much ſuſ-* " *pect, you have not the money*—we *muſt have* " *your affairs cleared up.* Whatever *you are, we* " *are almoſt broken-hearted, to ſee how you are* " *going on, and have of late.* And what will be " the

" the consequence, if you are worth 3000l.?
" We know, and have seen, the consequence
" elsewhere."

Some vague suspicions beside, have been mentioned at the bar, by the counsel for the plaintiffs: as, that they were all of them *Quakers*, and endeavouring to play into each others hands, to the prejudice of *Satterthwaite*'s other creditors; that *Satterthwaite* had broke before; that all the bills were after *May*; (which the other side denies.)

But as I proceed upon *allowing* the evidence *to prove* the conclusions contended for, it is only necessary to examine what those *conclusions* are. The report says, " that a false cre-" dit was given the bankrupt;" *i. e.* he would have broke openly, unless they had lent him money. The counsel for the plaintiff say, the defendants lent him money to keep him from failing, *'till* his ships and goods might come home, consigned to themselves, or even to the bankrupt's own hands: whereas, if a commission had issued *before* that time, the *assignees* would have had them.

It was left to the jury, that if they believed, from the evidence, that the defendants *knew*, or *understood*, the bankrupt's circumstances to be *insolvent* at the *time* they paid his bills, they might find against him, *upon the ground of* FRAUD. And they found in the affirmative.

Had the question turned upon the validity of a payment made *after* an act of bankruptcy committed, within the act of 19 *G. II. c.* 32.* (which was one of the points made at the trial,) the direction would have been quite agreeable to the terms of that act. But, as the question was, " Whether, supposing the whole " transaction *before* any act of bankruptcy " com-

* Vide §. 1.

"committed, the defendants were to be ex-
"cluded from claiming satisfaction for the
"money they had advanced upon *Satter-
"thwaite*'s bills, by reason of their fraud in
"advancing it;"—we are all of opinion,
"that the *direction was a* MISTAKE."

It is NO *fraud* for a factor, *knowing* the circumstances of his principal to be desperate, and *believing* that he must break unless he can procure credit, to *advance money* upon his bills, *to save him from an immediate failure.* On the contrary, it is an honourable, friendly, and generous act. *No prejudice* can arise but to the *lender* himself. *He* may lose the whole, or the greatest part of the money so advanced: but the *principal*'s estate, if he breaks, is by so much a *gainer*, or *some particular creditors*, to whom this money has been *paid*, are *gainers*. If, by this assistance, the principal has the good luck to *stand his ground*, he and *all* his creditors are *benefitted:* but *none* of his creditors can *suffer* by the advancement of money to their debtor. Many beneficial instances of this kind have saved the most considerable houses from ruin.

If the factor trusts that effects of his principal will come over from abroad, consigned to him, by which means he may *acquire a lien* upon them for his reimbursement, the factor's conduct is a little more prudent; but still it is free from all colour of *fraud*. It is the *usual method* of dealing between principals and factors in *good* credit; the latter advances money upon the faith of consignments: but when a factor, knowing his principal to be in *great distress*, and in *immediate danger of failing*, advances money upon the *faith* "that

 "effects

" effects beyond sea *will* come over consigned " to him," he acts *meritoriously*.

The richest man in trade may be ruined, while his effects are abroad, and not in his own power, to answer immediate demands upon him, (which was the case of the *Woodwards*, who could not save themselves from failing, though they had sufficient to pay 30 s. in the pound.) But the factor may actually save him by this assistance, 'till they come home: and yet the factor himself runs a great risque, and trusts to a *precarious* security. For the goods may in fact be consigned originally to *another*; or the consignment to him may be *countermanded*; they may be *sold*; they may be *mortgaged*, or *burnt*, or *lost*, and never come into his possession so as to give him any lien: and it appears by the letters that have been read, that, in this very case, *Satterthwaite* unworthily made over to other persons part of the goods to which the defendants had trusted for their security.

A *mortgage* of ships abroad, or of cargoes upon the high seas, by a trader, to any body, is *good*, notwithstanding the clause in 21 *Jac. I. c.* 19. * though possession has not been actually delivered: for a bill of sale is all the possession that can be delivered, 'till the ship comes home.

* Sect. 11th.

There scarce happens a bankruptcy, in which it does not appear that a fictitious credit has been acquired by drawing and redrawing bills of exchange, and by accepting and indorsing promissory notes: yet there never was a doubt, but that the persons lending their names, by which they render themselves at last liable, may come in as creditors. The case of a man who has *actually paid his money*

to

to support the credit of another, is infinitely stronger than that of lending a name only, without advancing any money at all.

There cannot be a greater paradox, than that a man should be guilty of a *fraud*, in lending his money with *no other prospect* but the *chance* of being repaid it.

Of lending money to traders known to be in dubious circumstances.

A notion, "that lending money to traders, "knowing them to be in dubious, tottering, "or distressed circumstances, upon mort-"gages or liens, is fraudulent; and, conse-"quently, the contract void in case a bank-"ruptcy ensues;" would throw all mercantile dealing into inextricable confusion. Men lend their money to traders upon mortgages or consignments of goods, *because* they suspect their circumstances, and will not run the risque of their general credit.

Though we have all been clearly of opinion, that no conclusion attempted to be drawn from the evidence in this case, allowing it to be true, amounted, in point of law, to the offence of *fraud*, and a forfeiture of the debt on *that* account; yet I have so great a regard for the authority of my brother *Noel*, (whose knowledge and experience is as great, and his opinion of as much weight, as any man's, both in courts of law and equity,) that I was desirous to talk the matter fully over with him; which I have done.

He says, the point upon which the defendants case is now put, and which was reserved for his opinion if it should be necessary, was not explained, or understood at the trial, as it is now: and the question of fraud was so intangled, by not distinguishing this case from that of a factor having goods in his possession consigned to him before an act of

 bank-

bankruptcy; and, *after knowledge* of an act of bankruptcy, advancing money to the bankrupt, with a view of covering the effects, and playing them into his own hands, in opposition to the bankrupt's assignees.

But in this case, where the factors did not know of the act of bankruptcy, he is now fully convinced that the facts did *not* amount to *fraud*, and that the jury should have been so told; and concurs in opinion, that there should be a *new trial*.

* In Chancery, M. 1749.

If we did not grant it, the precedent of * *Villain* v. *Hyde* must be followed; where a bill in Chancery was brought by the defendant at law in an action upon an *indebitatus assumpsit*, because allowances, which ought in justice to have been made to him at the trial, were not made. Lord *Hardwicke* was, in that case, under great difficulties how to proceed, upon such a ground, to give relief in equity: but the strong justice of the case prevailed upon him to shew such a disposition, as induced the assignees to consent to the allowance, and make a satisfaction agreeable to the real justice of the case.

We are all of opinion that the rule be made absolute for a NEW TRIAL: but the new trial must be upon *payment* of COSTS.

RULE made ABSOLUTE for a *new trial*, upon payment of costs.

N. B. The assignees acquiesced; and never tried the matter again in this action, nor brought any other.

Friday, 20 Nov. 1761. Wright, ex dimiss' William Clymer v. Littler et al'. M. 2 Geo. III. B. R. 3 Burr. 1244.

This was an ejectment for certain copyhold lands within the manor of *Barnes*, in the county of *Surry*; in which manor there is a custom of *Burrough-English*.

The

Ejectment. Question upon a forged will or instrument, and a genuine will of prior date; with another question, supposing the latter instrument not forged, if it was a revocation of the first will; also another question, as to the legality and admissibility of the evidence offered and received to impeach the latter instrument. The judge directed the jury to find for the plaintiff upon the prior will, which they did

Motion for new trial, on the ground of misdirection, int. al. new trial refused.

The lessor of the plaintiff, *William Clymer*, made out his title, under a regular and undisputed will of his grandfather, *John Clymer*, dated 17th *February*, 1743, and executed in the presence of three witnesses, disposing of his freehold, as well as of this copyhold estate, to the lessor of the plaintiff in fee; the testator, *John Clymer*, having previously surrendered the copyhold to the use of his will.

The title of the defendants (who were purchasers under another *William Clymer*, second and youngest son of *John*, and uncle to *William*, the lessor of the plaintiff,) depended upon another *subsequent* will (or instrument which they called a will) made by the said *John*, as they alledged, on the 20th of *September*, 1745; which, they contended, was at least a REVOCATION of the former will in 1743. And if it *be only a* REVOCATION of the former will, then *William*, the youngest son of *John*, must inherit as heir in *Burrough-English*.

This will or instrument of 1745, (which was *not* under seal,) was all written by one *William Medlicott*, who was son-in-law to the said *John Clymer*, (having married his only daughter *Amey*.)

It was also indorsed on the back, in the *same* hand-writing of the said *William Medlicott*, in these words—" The COVENANT and " AGREEMENT of *John Clymer*:" and it was witnessed by the said *William Medlicott*, and one *Elizabeth Mitchell*.

The body of it was in these words: " Know " all men by these presents, That I *John Clymer*, of *Barnes*, in the county of *Surry*, " Gent. have this day COVENANTED and " AGREED in the manner and form following, that is to say: For natural love and

" affection which I have and bear to my son,
" and daughter, and grandson, herein after
" named, I do *make*, *constitute*, and *appoint*
" the several estates and sums of money fol-
" lowing, after the decease of myself and
" *Amey* my wife, to come to and be given
" to them. But first of all, my estate called
" *Barnes* and *Hopton*, to my wife for her life;
" and, after her decease, all that eighteen
" pounds a year, to my son *William Clymer*,
" for his life; and, after his decease, to *Wil-*
" *liam Clymer*, my grandson. And as to all
" those COPYHOLD messuages, lands and te-
" nements at *Barnes*, in the county of *Surry*,"
(which is the estate in question) " to my
" daughter AMEY, *the wife of* William Med-
" licott, *her heirs and assigns for ever*; to take
" and hold the same after the immediate
" death of myself and said wife, and not be-
" fore. Dated 20 *September*, 1745. *John*
" *Clymer*. Witness, *Elizabeth Mitchell*—*Wil-*
" *liam Medlicott*.

It happened, in fact, that this *Amey Med-licott*, daughter of *John Clymer*, and wife of this *William Medlicott*, died *before* her father.

In order to be better understood, I will give a short pedigree of the family, and specify the particular times of their respective deaths.

Old

Old John Clymer, the teſtator, ſeiſed in fee, died in April 1746. He had iſſue by his wife Amy, two ſons and one daughter.

Amy, wife of old John Clymer, died in his life-time, viz. 7 Feb. 1745.

John Clymer, eldeſt ſon, died in his father's life-time, leaving iſſue a ſon and a daughter.

William Clymer, ſecond ſon, died November 1747, a widower, without iſſue.

Amy Clymer, married William Medlicott: ſhe died in her father's life-time, viz. in January 1745, without iſſue.

William Clymer, leſſor of the plaintiff.

Amy Clymer, died an infant.

Upon the death of old *John Clymer*, in 1746, his ſecond ſon, *William Clymer*, was admitted to this copyhold eſtate (the premiſes in queſtion) as heir in *Burrough-Engliſh*: the above mentioned will of old *John Clymer*, in 1743, being then UNKNOWN to every body *except* the above named *William Medlicott*, who had it in his *poſſeſſion*, but *ſecreted* it.

This *William*, youngeſt ſon of *John*, enjoyed the eſtate until 1751; and afterwards ſold it to one *Penley*. *Penley* was admitted, and aliened it to one *Mitchell*, who was admitted in 1751; and afterwards ſold part of it to *Littler*, one of the preſent defendants, who was admitted to that part: the other part deſcended to *Penley*'s heir, who was admitted thereto, and then ſold it to *Pelham*, another of the preſent defendants, who was alſo admitted in due manner.

During the time of all theſe tranſactions, the leſſor of the plaintiff was at firſt a *minor*, then at *ſea*, always *poor*, and remained *ignorant* of the will in 1743, 'till the death of *William Medlicott*, who produced it when dying, and directed it to be delivered to the leſſor of the plaintiff.

William Medlicott died in *May* 1747. He had the cuſtody of *both* wills, 'till a few weeks before his death. The latter will was *found* among his papers. The former was *delivered* by the ſaid *William Medlicott* to one *Edwards*, about three weeks before his death; and it was, about three months after, delivered to *William Clymer*, the leſſor of the plaintiff, who was then about two years under age, but proved it in 1751.

After this diſcovery, the leſſor of the plaintiff did not bring this ejectment 'till after an acquieſcence of fourteen or fifteen years from his uncle's firſt admiſſion to it, upon old *John*'s death, or at leaſt, without the nephew's ſetting up any claim within that time; during which his uncle *William*, or the purchaſers under him, had been in quiet poſſeſſion.

At the trial, the leſſor of the plaintiff produced and proved the will of 1743, under which he was deviſee of this eſtate in fee.

To encounter this evidence, the defendants produced this will, or inſtrument, in 1745; and both the witneſſes to it (*Elizabeth Mitchell* and *William Medlicott*) being dead, they proved their hand-writings, and alſo the hand-writing of old *John Clymer*, in the common and ordinary form.

Whereupon the plaintiff's counſel inſiſted, that this will or inſtrument was, in the firſt place, an abſolute FORGERY; and, in the next place, that, in point of law, it could NOT *operate as a* REVOCATION of the will in 1743.

And they called *Mary Victor*, ſiſter to the ſaid *William Medlicott*, who was one of the ſubſcribing witneſſes to the will, or inſtrument, of 1745: which *Mary Victor* ſwore,

" That

" That whilst she was attending her said
" brother *William Medlicott*, in his last illness,
" and about three weeks before his death, he
" pulled out of his bosom the will of 1743,
" and said ' it was the TRUE will of *John*
" *Clymer*;' and then delivered it to her, with
" directions to deliver it over to *William*
" *Clymer*, the lessor of the plaintiff, or to Mr.
" *Faulkner*." And she added, " that one
" *Edwards* was present at the time."

This *Edwards* (who had been already called on the part of the defendants, to prove the hand-writing of *Elizabeth Mitchell*, one of the witnesses to the will or instrument of 1745,) on being cross-examined on the part of the plaintiff, confirmed *Mary Victor*'s evidence, " That *Medlicott* did pull the will of 1743 " out of his bosom, and gave it to her with " such directions as she had deposed."

Upon *Mary Victor*'s CROSS-*examination* by the counsel for the defendants, she not only persisted in what she had before deposed, but also added, that at the same time that *William Medlicott* produced the will of 1743, as the *true* WILL of old *John Clymer*, HE ACKNOWLEDGED and DECLARED to her, " that the said " will or instrument of 1745, *was* FORGED BY " HIMSELF."

No objection was made to this evidence, by the counsel for the defendants, *at the trial*.

The judge and jury (a special one) perused and examined the two instruments of 1743, and 1745, and their different signatures;— and took notice of the circumstances of the latter, being all of the hand-writing of this *William Medlicott* himself; and disposing of a fee to *Medlicott*'s own wife: and upon the whole, they were all of opinion " that it was

" a

"a FORGERY." And the judge *directed* the jury to find for the plaintiff: which they did.

On *Tuesday*, 10th *November*, 1761, Mr. *Norton* moved, on behalf of the defendants, for a *new trial*; upon the foot of a *mis-direction* by the judge who tried the cause, upon a point of *evidence*: and a rule was made to shew cause why the verdict should not be set aside, and a new trial granted.

This cause coming on to be argued yesterday, (19th *November*, 1761,) Mr. Justice WILMOT reported the * evidence from Lord Chief Justice *Willes*, who tried the cause, and who was satisfied with the evidence; and reported that no *objection was made at the trial*, to the evidence given by this witness, *Mary Victor*.

* Sir J. Burrows says, I have already endeavoured to throw the whole together, as clearly as I was able.

Mr. Justice *Wilmot* having made his report, and several *additional circumstances*, *not mentioned in the report*, having been *agreed* by the counsel on both sides,

Mr. *Norton* proceeded. He objected to the *admission* of *this evidence*, as being only HEARSAY evidence. What *Medlicott* said, ought not to be admitted or regarded: for it was not said *upon oath*, nor was there any opportunity of *cross-examining* him.

Indeed this evidence would have been of little or no weight, even if he had given such a testimony HIMSELF; after having himself solemnly *attested* this will, as a witness to it.

This pretended declaration was made near fifteen years ago (for he died in 1747:) and yet the ejectment was not brought till 1761. This sort of evidence shall not overturn a title confirmed by so many years possession.

Besides, we are a *purchaser* for a *valuable* consideration, under the heir at law; to whose title no objection was ever made.

9 Mr.

Mr. *Eliab Harvey*, for the plaintiff, admitted the *possession* to have gone in the course of *descent* in *Burrough-English*; but observed that the granting new trials is not so necessary in *ejectment* as it may be in other cases; because it is easy to bring another ejectment.

As to the *length of time* they have been in possession—*William*, the grand-son (the lessor of the plaintiff) was *poor*, a *minor*, at *sea*, and *ignorant of the will in* 1743.

Our title stood upon an *unexceptionable will*. Their's is rather a *deed of covenants*: but they insisted upon it *as a testamentary act*, and a *revocation*.

Their own witness, *Edwards*, proved, in the course of giving his evidence, "that *Medlicott* "*did produce* out of his bosom, the will of "1743, and delivered it to *Mary Victor*, to "be given to the lessor of the plaintiff, or to "Mr. *Faulkner*."

We called this *Mary Victor*, not to give *evidence of the forgery*, but to *impeach the credit* of their evidence *William Medlicott*.

If *Medlicott* had been *living*, he must have been *called* to prove the will. And if he had *owned* "*that he forged it*," it could *not* have been established: or if he had *proved the execution* of it, we should have been at *liberty to discredit* his personal evidence, by *shewing* "*that* "*he had himself owned it be a forgery*." And surely, we may give the SAME evidence *after he is dead*, in contradiction to the proof made by *other* persons of his hand-writing.

In this second instrument of 1745, there is a disposition to "*Medlicott*'s wife, in fee:" she *died before* the testator. But it was *no will*, *no testamentary act*, nor even a *deed*.

This

This is the verdict of a *special* jury. And Lord Chief Justice *Willes* compared the papers, and declared " that it bore the *appearance* of " a forgery." The jury thought so too. And their verdict ought to stand.

Lord MANSFIELD ordered both the wills or instruments to be produced here to-day: to which time it was adjourned.

And they being now, accordingly, produced, Mr. *Norton*, for the defendants, proceeded, to the following effect. We could have proved this will, even *without calling Medlicott*, if both the witnesses had been living: or if *Medlicott* himself had been alive and been called, he might have explained the occasion of his saying such words to such a person, and at such a time.

The *consequence* of admitting such evidence as this is, would be fatal: and no purchaser under a will could be safe.

Here were many *notorious changes of the property*; and an absolute *acquiescence* all the time, by the lessor of the plaintiff.

The wills are now both of them before the court. That of 1745, enures either as a *will of copyhold land*, or as a good writing to *appoint the uses* of a surrender of copyhold land; or at least, as a *revocation* of the will made in 1743.

First, It is a good will of *copyhold* lands. *Copyhold* lands are *not within* the statute of frauds: and *no witnesses at all* are necessary to such a will. It is a good will under the statute of *Hen. VIII.* * that statute only requires " that " it be a will *in writing*."

* 32 H. VIII. c. 1.

I agree that here is no disposition of the *personal* estate, or any appointment of an *executor*. But still it is a good will of *copyhold* land: for neither of those are necessary in a will of copy-

hold

hold land. It gives an eſtate for life to his wife, with remainder to *William Clymer*, under whom we claim. And the eccleſiaſtical court have received it, and ſuffered it to be proved *as a will.*

Secondly, it is a *good inſtrument to appoint the uſes of a ſurrender.*

Any writing is ſufficient for *this* purpoſe: it needed not any atteſtation.

Thirdly, At leaſt, it will operate as a *revocation.*

Revocations are *favoured*, both in law and equity. There are many methods of revocation: a will may be revoked by *mere operation of law*, without the intention of the party. A feoffment without livery, a bargain and ſale, without inrolment, a grant, without attornment, are ſufficient to do it.

But by his *own act*, a man may, by writing, revoke one will, without making another.

Before the ſtatute of frauds, he might have revoked it *verbally*, by mere *parol* only.

Any act *inconſiſtent* with the will, *though ineffectual* to the purpoſe it was *intended* for, yet being done by the maker of the will, is a *revocation*; becauſe it ſhews his intention to revoke the diſpoſition he had before made of his eſtate.

This writing fully ſhews the *animus revocandi.* Which alone is ſufficient. It is indeed a very inaccurate inſtrument: but it is *in writing*; and he ſays * "*I have agreed* that my "eſtate ſhall go ſo and ſo." And this will or writing ſhews his intention of a *total* revocation of the former: for, by this, he diſpoſes of his land to a very different purpoſe, from the former diſpoſition of it, by the will of 1743.

Both wills were read in court.

* Vide ante.

Mr.

Mr. *Harvey* and Mr. *Lee* were for the leſſor of the plaintiff, *William Clymer*, the grandſon.

They obſerved that Mr. *Norton*'s objection was confined to the evidence of *Mary Victor*, ſiſter to *William Medlicott*, one of the witneſſes to the will of 1745: and they obſerved too, that her evidence was *corroborated* by the evidence of Mr. *Edwards*, one of their *own* witneſſes.

But it was to be further obſerved, they ſaid, that the verdict was *not founded* on this evidence ONLY. For the ſpecial jury actually *ſaw* and *deliberately peruſed* the will or inſtrument of 1745, and upon ſuch *view*, *inſpection*, and *examination*, and upon all the circumſtances of the diſpoſition, they judged it to be a forgery.—Beſides, *no objection* was taken to this evidence, *at the trial*. They might have objected to it then, or demurred to it.

As to *acquieſcence*—The leſſor of the plaintiff was but ſeventeen years of age, when his grand-father died; was always poor; and was at ſea, the moſt part of his time.

But as to the EVIDENCE itſelf—It was *ſtrictly* and *legally admiſſible*. It was not given in order to *prove the forgery*; but to DISCREDIT their evidence, ariſing from the proof of *Medlicott*'s hand; *Medlicott* muſt have been called, *if living*; and would have overturned the will or writing of 1745, by giving this evidence of what *Mary Victor* ſwears he owned to her. The preſent proof is only "that he was a "ſubſcribing witneſs." And this evidence might be and was proper to be given, to take off the force of ſuch his atteſtation. As to the *legal operation* of this will or inſtrument of 1745,—

Firſt,

First, It is *no good-will* of LAND of *any* kind; there is no *animus teſtandi*; no publication; no mark of a will.

Secondly, Neither can it be a ſufficient *appointment of the uſes* of a ſurrender made to the uſe of a WILL; when it is *not a will* at all, nor even a teſtamentary appointment.

Thirdly, Nor can it operate as a REVOCATION of the former will. Here are no *words* of revocation; no declaration of an inclination to it: *no* ſuch *intention* appears. Revocations are *not favoured* now: the ſtatute of * frauds ſettles the point, in what manner they ſhall be made. Feoffments to uſes, bargains, and ſales inrolled, and grants operate by relation to the life-time of the teſtator: and a feoffment without livery, a bargain and ſale without inrolment, or a grant without attornment, are only incomplete. But a *mere covenant* "to make a feoffment in fee," without more, is no revocation of a will: as was determined in the caſe of *Montagu* v. *Jeoffereys*, in *Moore*, 429. and 1 *Ro. Abr*. 615. *pl*. 3.

* 29 C. 2. c. 3.

Little or nothing is to be found about revocations of wills of *copyhold* lands. But it has never been determined, "that a will of "copyhold is *not* within the *revoking* clauſe of "the ſtatute of frauds."

A will of copyhold lands cannot *now* be revoked by *parol*: it muſt be by ſome *other will declaring the ſame*. In the caſe of *Eggleſton et al*. v. *Speke*, 3 *Mod*. 258. the ſecond will did not operate as a revocation of the former; becauſe it was not a good will in all particulars, and there was *no ſuch declared* intention. *Carthew* 79. *S. C.*

But a mere *covenant* and agreement will not revoke a will. 1 *Ro. Abr*. 615. *pl*. 3. Title

Deviſe.

Devise. Letter P. And yet that was a covenant in pursuance of a marriage: which makes it a very strong case.

The words "*constitute and appoint*," are *not testamentary words*: nor is there any *publication* of this writing. It is *not under seal*: which it ought to be, in order to revoke what is under seal: therefore, *as* an *appointment*, it cannot revoke the former will. It ought also to have been done in the presence of *three* witnesses, by the statute of frauds, the twenty-second section takes care of the *revocation* even of wills of PERSONAL estates; though it does not meddle with the *making* them.

And this is a ground for a presumption, "that the legislature considered *copyhold* wills "to be within the provision of the statute, as "to the *revocation* of THEM too."

The revocation in the present instance, must be extended to the will of the freehold, as well as of the copyhold, if it operates at all: it cannot operate as a revocation of *part* of the former will, and *not* as a revocation of *another* part. It must be an intention to revoke the *whole*: it must intend *to give to another*, as well as to *take from* the former. In the case of *Onions* v. *Tyrer*, 1 *Williams*, 345. Lord *Cowper* argues upon this principle, "that if "the second devisee *took* nothing, the first "devisee could *lose* nothing. But in this case now before the court, nothing is given to any other person. This *covenant* is no revocation of a will. 2 *Peere Williams*, 623. *Cotter* v. *Layer*. And it cannot take effect as a testamentary revocation. The defendants cannot be purchasers for a valuable consideration, under a public notoriety; and *without notice* of our claim. All the purchasers were *under notice* of

a will:

a will: and the defendants consulted counsel upon the validity of it.

This evidence is *admissible*; because it was the solemn declaration of a dying man to his nearest relation; which is equal to an oath: for such declarations of dying men have been admitted as evidence even in cases of *murder*. So that it ought not to be called "MERE "*hearsay* evidence."

But their objection comes *too late*; as it was *not taken* upon the trial: they even *cross-examined* the witness. So is *Lucas's Rep.* 202, 203. *H.* 12 *Ann. B. R. Queen* v. *Corporation of Helston.*—"If counsel do not, at the trial, in-"sist upon an objection, there ought to be no "new trial." *H.* 2 *Geo. II. Fitzgibb.* 40. Anonymous.

Vide post IX. (12.) (a.)

Mr. *Lee* moved for a new trial, because his client had made a mistake in point of evidence: and it was denied; because "*vigilan-*"*tibus non dormientibus jura subserviunt.*"

This express evidence of the direct *forgery* came out upon Mr. *Knowler's* CROSS-*examination* of our witness (this *Mary Victor*;) *not* upon *our* examination of her.

Mr. *Norton*, in reply.—This will of 1745, says, "*I appoint my lands to come to, and be given* "*to, &c.*" It cannot be a covenant to stand seised: there is *no seal*, *no covenantee*; and besides, it is *copyhold*; of *which* there cannot be a covenant to stand seised. It must operate as a *revocation*.

Wills of *copyholds* are *not* within the statute of frauds; either as to the *making* or as to the *revocation* of them. They stand just as they did: the *revoking* clause can never extend to them, when the *enacting* clause does not.

As to the case of *Eggleston et al.* v. *Speke.* 3 *Mod.* 258.—the nature of the estate is different from this. This is a revocation of the will *in toto, quoad* the *copyhold* land.

A *will* may be *good as to copyhold,* though *bad as to freehold:* therefore so also may a *revocation* be.

An instrument may operate *as* a *revocation;* though it be void as to its professed end and intention: as, for instance, a will devising land to a papist.

As to the case in 1 *Peere Williams,* 345. there was *no intention* to revoke the will, and let in the heir at law.

But in the present case, the two acts of the testator are *inconsistent.* This is *not a covenant to do* the thing; but *actually doing it:* it does not *rest in futuro.*

Nothing passes by a feoffment, without livery; or by a bargain and sale, without inrolment; or by a grant without attornment: and therefore in such case there can be no reference backwards.

Lord MANSFIELD.—The defendants came to the trial, apprised of the plaintiff's title, and prepared to encounter it.

There is no doubt as to the will of 1743; which is the plaintiff's title. The only answer to it, which the defendants now alledge, is, "that the instrument of 1745 has revoked it." And they do not suggest that they can give any new evidence in support of that instrument, or the point of revocation. The jury have found for the plaintiff: consequently, "that the will of 1743 was *not* revoked." Lord Chief Justice *Willes* is satisfied with the verdict. This motion, therefore, and the argument in support of it, as there is no pre-

tence

tence that the defendants can mend their caſe upon a new trial, is in the nature of an appeal from his opinion.

There are three grounds, any *one* of which, if made out, is ſufficient to ſupport this verdict. If the inſtrument of 1745 was *forged*, if it was *obtained by fraud and impoſition*, though, not forged; or, though duly and fairly executed, if it be no revocation.

As to the firſt ground, the defendants complain, that the Chief Juſtice miſ-directed the jury, by leaving to them as evidence, the declaration of *Medlicott* "that he forged it."

Anſwer. It came out upon their *own* examination. They made no objection to it at the trial, and it certainly was a circumſtance *proper* for the jury to conſider. The competence of evidence depends upon the circumſtances under which it is given.

The will of 1743 is ſet up after fifteen years. It was neceſſary to ſhew how it was ſecreted, and how diſcovered. The declaration of *Medlicott* in his laſt illneſs, when he produced and delivered it for the uſe of the plaintiff, is allowed to be competent and material evidence. The inſtrument of 1745 was equally in his cuſtody and ſecreted. The account he gave of it in his laſt moments is equally proper, even though it had been upon an examination by the plaintiff, (eſpecially as it was all written and witneſſed by him, and gave the premiſes in queſtion to his wife,) as the account was a confeſſion of great iniquity, and as he could be under no temptation to ſay it, but to do juſtice, and eaſe his conſcience; I am of opinion "the evidence was proper to be left to "the jury."

 But,

But, independent of this declaration, *forgery* or *fraud* was *apparent*. *Medlicott* appears to have been a bad man. It is all written by him, and gives the fee to his wife, in prejudice of *John Clymer*'s male issue. It is worded as an irrevocable settlement; without cause or consideration. *Medlicott* never dared to produce it; and chose rather to conceal the will of 1743, that the younger son might be admitted and possess the premises.

But lastly, This paper is NO *revocation*. It is no will: and therefore cannot direct the uses of the surrender. It is no conveyance. It is no agreement with any body. It does not purport having been delivered to or for the use of any body. There is no proof that it was out of the custody of *John Clymer* before his death. It ought not to have been out of his custody; because it is voluntary, and without any consideration. He could not have been obliged to perform it. Then it amounts to no more than his bare saying, "that he *intended* "to make a will or surrender to the use of "his daughter, in fee" and *did* neither. An INTENTION to revoke by a future act which a man cannot be compelled to perform, is no revocation, *till* the act is *done*. All the cases are so: and the reason is evident.

It is to no purpose to grant a new trial; because I am satisfied that the verdict is, in every light, agreeable to the true justice of the case.

Was it a measuring cast, or if the defendant had been *surprised* by the plaintiff's title, I should have thought otherwise.

The defendants are purchasers from the heir of a copyholder duly admitted. There has been a possession above fifteen years. The title set up by the plaintiff is a will *concealed*.

But,

But, be these favourable circumstances as they may, the trial had is satisfactory beyond a doubt: and the defendants cannot mend their case. Therefore it would be vain and vexatious to grant a new trial.

The three other judges declared their entire concurrence: but declined expatiating upon it, or entering into particulars, as Lord *Mansfield* had so fully gone through it.

Per cur. The rule must be DISCHARGED.

Sulston v. Norton. M. 2 G. III. B. R. 3 Burr. 1235. Action upon the Bribery Act. Verdict for plaintiff. Motion for a new trial. 1. Obj. That the man bribed did not vote for the party on whose behalf he was bribed, and therefore plaintiff ought not to have recovered. 2. Obj. That the verdict ought not to have been upon the first count, which was for a gift, i. e. for giving money. That there being counter notes, it was not a gift, but a loan. New trial refused.

This was an action on the statute of 2 *G. II.* c. 24. §. 7. "For the more effectual preventing bribery and corruption, in the election "of members to serve in parliament."

The declaration contained five counts:—*First*, That the defendant *corrupted* one *Moore to vote* for Lord *Villiers* and Sir *Robert Burdett*, by *giving* him five pounds five shillings,—*Secondly*, A corrupt *agreement to give Moore* five pounds five shillings;—*Thirdly*, A corrupt agreement to lend him five pounds five shillings upon a promissory note;—*Fourthly*, A corrupt agreement *to deliver the note to Moore* on voting; *Fifthly*, For *giving the note and counter-note* hereafter mentioned. A verdict was found for the plaintiff, and entered on the first count.

Mr. Serjeant *Hewitt*, on behalf of the plaintiff, shewed cause against setting aside the verdict; which had been moved for, on the part of the defendant.

Mr. *Caldecott*, on behalf the defendant, had objected, when he made that motion,

First, That the man *did not in fact vote* for the persons he promised to vote for; but, on the contrary, voted for their opponents: and therefore the defendant, as he did not by any corrupt agreement, *procure Moore* to vote for

them, cannot be ſaid to have *corrupted* him to do ſo.

Secondly, That the verdict ought not to have been taken on the firſt count, which was for *giving* him the money.

To the *firſt* objection, the caſe of *Buſh* v. *Rawlins*, in *B. R. P. & Tr.* 29 *G. II.* was ſaid, by the Serjeant, to be a full anſwer, being in point.

And in anſwer to the *ſecond* objection, he alledged, that the evidence given very ſufficiently ſupported the taking the verdict on the firſt count; and for the truth of his allegation, appealed to Mr. Juſtice *Foſter*, who tried the cauſe.

Mr. Juſtice FOSTER reported the evidence to have been, "That the defendant gave *Moore* "five guineas, to vote for Lord *Villiers* and "Sir *Robert Burdett*; that *Moore* gave him a "note for it; and the defendant gave him a "counter-note, obliging himſelf to give up "the former note, when the condition ſhould "be performed."

Mr. *Caldecott* and Mr. *Thurlow*, for the defendant, thereupon obſerved, that the act of parliament ſays, "If any perſon, &c. ſhall "take any money, &c. by way of gift, loan, "or other device:" and though the plaintiff has laid this ſeveral ways, he has taken a verdict as upon a GIFT; whereas it appears in fact, NOT to have been a GIFT, but a LOAN, or other device.

In order to intitle them to take a verdict on the firſt count, they muſt have proved it to be a gift: which, it appears by the judge's report, they could not prove. And we have a verdict *for the defendant*, as to all the *other* counts.

The

The ſtatute expreſsly diſtinguiſhes between *gifts*, and loans or other devices. And ſo indeed does their own declaration: for the firſt count is founded upon the former; the four others, on the latter.

This action being upon a penal ſtatute, it therefore ought to be taken ſtrictly.

This caſe, *as it is laid*, differs from that of *Buſh* v. *Rawlins*: the reſolution there does * not interfere with this. For here, "*corrupting* "*Moore* to give his vote," muſt mean actually "*procuring* him to give his vote:" whereas the man did *not* vote ſo; and conſequently, the other candidate (Mr. *Luttrel*) was not hurt, at all, by what the defendant did.

Lord Mansfield.—The firſt objection is in the nature of a motion for a new trial, on account of a *mis direction* by the judge.

But the caſe of *Buſh* v. *Rawlins*, is in point. And I wonder how it could ever be a doubt: for the offence was completely committed by the *corrupter*, whether the other party ſhall afterwards perform his promiſe, or break it.

Secondly, As to the verdict's being taken on a wrong count—The evidence *does* ſupport the firſt count. For this is a gift: the note and all the reſt is mere *evaſion*, *colour*, *diſguiſe*, and *device*, to evade the law.

But *if* it were not ſo, the verdict was given generally for the plaintiff. If, by miſtake, it has been entered upon a count not proved; inſtead of the count which was proved, *that* is no reaſon for a new trial: the blunder has not injured the defendant. The court ought rather to rectify the miſtake, by ordering the verdict to be entered upon the right count, agreeable to the evidence, and conſequently the

* That reſolution was "that "the giving a "bribe to forbear voting at "the election of "a member to "parliament, "was an offence "within this "ſame act and "clauſe, altho' "the man did "not forbear to "vote, but actually voted "for the opponent's candidate, and that "there was no "need for the "plaintiff to al"ledge in his "declaration, "that the man "did actually "give or forbear "his vote, ac"cording to his "promiſe."

the *true* ground upon which the jury found for the plaintiff.

However, the *gift* is the *true* and proper count to take it upon: if it was really a *loan*, it would be *no* corruption.

Mr. Juſtice *Wilmot* held accordingly. This is the right and true count to take the verdiċt upon.

Per cur. Rule diſcharged.

Catherine How, widow, v. Edward Strode, M. 6 Geo. III. C. B. 2 Wilſon 269. Replevin: avowry, damage feaſant. Plea preſcription for common, from time of getting and carrying away corn, until land reſown. Replication, a cuſtom to incloſe, which diſcharges the land from the right of common. Incloſure. Rejoinder. De injuria ſuâ propriâ. Traverſing the cuſtom. Sur-rejoinder taking iſſue upon the cuſtom.

Replevin—Avowry, that defendant took the cattle *damage feaſant.*

Plea in bar the place in which, *&c.* is part of *Eaſt-field*, that plaintiff is ſeiſed of ten acres of land in *B.* and claims common of paſture in *Eaſt-field*, when the ſame is ſown with corn, and it is cut and carried away, until it be reſown; and at a proper time put in her cattle.

Replication to the plea in bar, that there are in *B.* two fields, *Eaſt* and *Weſt-field*, and that the owners thereof intercommon while they lay not incloſed for a certain time.

A cuſtom to incloſe, and that ſuch incloſure is freed from common of any other perſon, and that the perſon ſo incloſing, thereby frees and diſcharges all the unincloſed from all common, in reſpeċt to ſuch land incloſed.

That he incloſed the place in which, *&c.* to which he had a right of common before, whereby all the unincloſed lands were freed from his ſaid right of common; and that the place incloſed ought to be free from common of any other perſon.

Plaintiff *rejoins*, that ſhe put in the cattle 'till defendant took them of his own wrong, and traverſes the cuſtom to incloſe, *&c.*

Vide the pleadings at length in Wilſon.

The defendant ſur-rejoins, and takes iſſue on the traverſe.

This

This cause was tried at the laſt aſſiſes for the county of *Somerſet*, the iſſue lying upon the defendant to prove the cuſtom; it was reported by the judge, that the defendant produced five very old deeds, and ſeveral other deeds, which *proved the cuſtom to incloſe*; he alſo called ſeven old witneſſes, three of the oldeſt proved the cuſtom to incloſe of their own knowledge, for a great number of years, and that they had been told (when they were young) by very old perſons then living, that it was the cuſtom for the land-owners in theſe fields to incloſe; and ſaid that they thought any man might incloſe his land. As to the right of common, whilſt the lands lay unincloſed, ſome of the witneſſes ſaid, that ſuch owners of the unincloſed lands, had a right of common without ſtint, *but that after any of them had incloſed his land, ſuch perſon had no right of common at all in the ſaid fields, or either of them.*

New trial, for miſ-direction of the judge, upon the evidence given for the defendant at the trial, the judge being of opinion he had not ſufficiently proved the cuſtom, whereas the evidence did prove it.

Another witneſs ſaid, if a man incloſed all his lands in the fields, he loſt his right of common totally; but that if he left any bit, only an acre, unincloſed, he uſed to enjoy his common in regard to that acre, unincloſed, juſt as before, and uſed to put in any number of cattle without ſtint; ſeveral other old witneſſes ſwore to the ſame effect, and here the defendants reſted their caſe; whereupon the judge was of opinion that the defendant had not proved the cuſtom, which he ſaid was *intire*: that ſeveral of the witneſſes had proved, that if a man incloſed 19 acres out of 20, it was the cuſtom for him, in reſpect to the one acre not incloſed, to put into the unincloſed lands as many cattle as he pleaſed, without ſtint, and as he had done before he incloſed the 19 acres,

acres, and therefore, the judge was pleaſed to tell the jury, that he thought the defendant had not proved the cuſtom intirely; and that, if they believed the land incloſed in queſtion was diſcharged and freed from any perſon having a right of common thereon, they ſhould find for the defendant; if not, that they ſhould find for the plaintiff: whereupon the jury gave a verdict for the plaintiff.

It was now moved for a new trial, for the *miſdirection* of the judge: 1ſt, For that the cuſtom to incloſe was fully and clearly proved; and, 2dly, That the right of common before incloſure made, was for cattle *levant* and *couchant* upon each perſon's unincloſed lands; and this matter is not at all in iſſue, but is admitted on the pleadings, by both ſides: the right of incloſure, with it's conſequence, *viz.* it's being freed from any perſon's former right of common thereon, was the only matter in iſſue; the other was a legal conſequence, and not traverſable, (to wit,) that the owner of ſuch incloſed land is barred of any future right to common on the unincloſed land in theſe fields; and what ſome of the witneſſes ſaid of common *without ſtint*, is nothing to the purpoſe, for there is no ſuch thing as common *without ſtint* belonging to land; common belonging to land can only be for cattle levant and couchant thereon: that the cuſtom to incloſe was clearly proved, as appears by the evidence before ſtated; and, when the land is incloſed, it is freed and diſcharged from any perſon's former right of common thereon. And of this opinion was the whole court; and ſaid, 1ſt, That the parties agree by the pleadings, that, while the lands in theſe open fields are unincloſed, all have a right of common for

for cattle *levant* and *couchant*; 2dly, The cuſtom to incloſe, and that the land as ſoon as, and while incloſed, is free from common, is fully proved: the 3d matter is a conſequence in law, and wanted no proof, *viz.* that, as ſoon as any perſon has incloſed, he has excluded himſelf from any right of common on any of the unincloſed lands: and any judgment given upon this record, cannot be a bar to any other party who may claim common in theſe fields *without* levancy and couchancy. *Per totam Curiam*, the verdict muſt be ſet aſide for miſ-direction of the Judge, and there muſt be a new trial.

This was an action upon promiſes againſt the defendant, as agent for work and labour, *&c.*

Macbeath v. Haldimand, E. 26 Geo. III. B. R. Durnford and Eaſt. 1 V. 173.

An officer appointed by government, treating as an agent for the public, is not liable to be ſued upon contract, made by him in that capacity. The judge having directed the jury to find for the defendant upon that ground, motion for new trial was made, as conceiving he had been miſtaken in point of law, and, conſequently, miſdirected the jury. Court of opinion the direction was right, and new trial refuſed.

Plea—the general iſſue.

The cauſe was tried at the Sittings after laſt *Hilary* Term, before BULLER, Juſtice, when a verdict was found for the defendant, by the direction of the Judge.

Upon a motion for a new trial by *Cowper*, the following facts appeared from report.

In the year 1779, the defendant, being Governor of *Quebec*, appointed Captain *Sinclair* to the command of a fort called *Michilimakinac*, ſituated upon the lake *Huron*, in the province of *Canada*.

On the 17th of *Auguſt*, 1779, defendant tranſmitted certain inſtructions to *Sinclair*, reſpecting the government of the fort, in which he ſays,

" You are to pay great attention to the *In-*
" *dians* reſorting to *Michilimakinac*, or fur-
" niſhed with neceſſaries from thence. En-
" deavour to preſerve them in good humour;
" and attach them, by every means in your

"power, to the King's intereſt." In a further part of the ſame inſtructions he adds, "You will draw bills of exchange for defray-"ing the contingencies incident to that poſt, "in the manner practiſed by Major *De Peyſ-"ter*, (an officer on whom that command had "been before conferred,) taking care to mo-"derate and reduce thoſe expences, as far as "can be done, without injuring the King's "ſervice."

For ſome time *Sinclair* employed one *Grant* to diſtribute preſents among the *Indians*, and to procure military ſtores, &c. for the uſe of the garriſon: and to defray theſe and other expences drew bills of exchange upon the Governor, according to his inſtructions. When theſe accounts came to the defendant, he made objections to ſeveral of the articles, as unneceſſary, and exorbitant; and ſoon after recommended the plaintiff to *Sinclair*, by a letter dated the 16th of *May*, 1782, of which the following is an extract:

"Upon an examination of the accounts, "accompanying your late drafts, for expences "incurred at *Michilimakinac*; the articles are, "in general, charged at prices exceeding all "bounds of moderation.

"Upon the compariſon of the prices made "here, the advantages taken of the neceſſities "of the crown, by the traders at *Michili-"makinac*, is ſhamefully obvious; and it is "more ſo in the account of Mr. *Grant*, who "appears to be an agent for government, "than in any other particular.

"Perſuaded that you have ſupplied your "wants from thoſe traders, in whom you "have had the greateſt reaſon to confide, I "find there is but little to be expected from

"any

" any of them reſiding at that poſt: which
" induced me to make inquiry, if any per-
" ſon could be found here more worthy of
" the public confidence. A Mr. *Macbeath*,
" who will deliver this letter, and who has
" juſt made application for a paſs, was men-
" tioned to me as a man of known and eſta-
" bliſhed integrity; and, upon a more par-
" tiular inquiry, I find that he has always,
" both here, and in the upper country, me-
" rited that character. I have propoſed to
" him to ſupply the crown with ſuch quanti-
" ties of *Indian* corn and greaſe, as may be
" wanted for the neceſſary purpoſes at that
" poſt; and likewiſe all other articles which
" ſhall occaſionally be wanted in the engineer
" department, which he has undertaken to
" do for 10 *l. per cent.* on the market
" prices at the place, (coſts and charges;) a
" profit which appears to be reaſonable, in-
" aſmuch as it is greatly under that hitherto
" charged."

(After ſome orders given relative to the plaintiff.)

" Theſe inſtructions, and all others that
" concern the intereſt of the crown, I am
" perſuaded that you will cheerfully give
" him."

A letter from the defendant to the plaintiff, dated *May* 17, 1782.

" Having thought it fit to direct Lieute-
" nant-governor *Sinclair*, commanding the poſt
" of *Michilimakinac*, to employ you in ſupply-
" ing ſuch quantities of corn and greaſe, and all
" other articles, as ſhall be wanted for the uſe of
" the crown at that poſt, in conſequence of
" your offer to furniſh the ſame at the rate of
" 10 *l. per cent.* on the coſts and charges here

" and

"and to *Michilimakinac*, for all articles, corn "and greafe excepted, and thefe at the fame "rate where they fhall be purchafed; for "which fufficient vouchers are to accompany "your accounts: you are, therefore, hereby "directed to make applications, from time "to time, to Lieutenant-governor *Sinclair*, "for fuch directions, information, and affift-"ance, as will beft enable you to execute "that bufinefs to the greateft advantage for "the public intereft; as your continuing in "this employ will intirely depend upon your "conduct therein."

Several fpecial orders were proved from *Sinclair* to the plaintiff, for fupplying particular articles, amongft which was the following, dated 1ft of *Auguft*, 1782.

"You will be pleafed for the future, with-"out any requifitions in form, to provide "for the different fervices of the poft, in the "manner leaft expenfive to government, and "ftill equal to the neceffities of the different "departments."

In purfuance of thefe orders, the plaintiff furnifhed articles to a confiderable amount. But when his bills, at the top of which was prefixed, "*Government debtor to George Mac-*"*beath, for fundries, paid by order of Lieute-*"*nant-governor Sinclair,*" were fent to the defendant at *Quebec*, he made objections to feveral of the articles, as being unreafonable, and furnifhed contrary to fubfequent inftructions.

Afterwards, on the 2d of *July*, 1784, *Matthews* (the defendant's fecretary,) wrote the following letter to Meff. *Dobie* and *Forfyth*, who were agents for the bill-holders.

"I am

" I am commanded by his Excellency Ge-
" neral *Haldimand* to acquaint you, that, in
" consequence of instructions from the Lords
" Commissioners of his Majesty's Treasury,
" in answer to a representation made by him
" to their lordships, concerning the bills drawn
" upon him by Lieutenant-governor *Sinclair*,
" in the year 1782, which he thought it neces-
" sary to refuse payment of, his excellency,
" in conformity with the offer which he made
" to the holders of the said bills in the year
" 1782, is still willing to pay such parts of
" the charges, for which the said bills were
" drawn, as at that time appeared, upon ex-
" amination, to be reasonable."

(After stating the amount of goods fur-
nished for the engineer department, to the
value of *9,266 l. 5 s. 1½ d.* which the Gover-
nor was willing to pay, the letter proceeded
thus :)

" His excellency will also pay for all the
" goods or utensils furnished for the engineer
" department, so far as they shall appear to
" be charged at reasonable prices, to be as-
" certained by merchants appointed for that
" purpose, by his excellency and the holders
" of the bills. And he will further pay for
" the labour, so far as the accounts thereof
" shall appear to be properly vouched.

" But with regard to the charges for the
" hire of horses and carts, his excellency,
" from the exorbitance of the charge, will
" have nothing to do therewith, leaving, ne-
" vertheless, to the complainants to take
" such methods to procure redress therein, as
" they shall think proper.

" With respect to the *Indian* department,
" his excellency will pay such part of the ar-
" ticles

" ticles as compoſe the accounts for which the
" bills were drawn, as were not purchaſed
" contrary to his orders to Lieutenant-gover-
" nor *Sinclair*, dated 22d *Auguſt*, 1781; and
" except alſo for the articles furniſhed by
" Lieutenant-governor *Sinclair* himſelf, which
" his excellency will not pay, as they were
" received from the *Indians*, in expectation
" of being well repaid, by the preſents which
" they afterwards received, from the King's
" ſtores.

(The letter then ſtated the account of *Indian* expences, amounting to 12,715 *l.* 9 *s.* 10 *d.* and concludes by ſaying,)

" You will therefore ſee, by the foregoing
" ſtate, that the ſum propoſed by his excel-
" lency general *Haldimand*, to be immediately
" paid, amounts to 21,981 *l.* 14 *s.* 11¼ *d.*
" *New York* currency."

The bills which *Sinclair* drew in favour of the plaintiff, were drawn on the defendant as governor and commander in chief.

The plaintiff finding that all theſe bills drawn by *Sinclair*, and indorſed by himſelf, which were to a much greater amount than the abovementioned ſum, would not be accepted by the defendant, received a partial payment from him, with a proviſo, that it ſhould not prejudice his claim for the remainder; to recover which, was the object of the preſent action.

The plaintiff remained in his poſt 'till 1785.

It was acknowledged at the trial, and in court, that all the accounts had been ſubmitted to a board of officers by defendant, for them to examine, and report what charges ought to be allowed; and that the ſum ad-

judged

judged by them to be due, which fell very ſhort of the plaintiff's demand, had been paid by the treaſury.

BULLER, *Juſtice*, after reporting the above facts, ſaid, that he had been of opinion at the trial, that the goods in queſtion having been ſupplied for the uſe of government, and the defendant not having perſonally undertaken to pay, the plaintiff ought to be non-ſuited. That it appeared to him, that the plaintiff had acted with the defendant ſolely in the character of commander in chief, conſidering him as the agent of government. That all the letters imported it to be a tranſaction on the part of government, and that the accounts confirmed it. But the plaintiff's counſel appearing for their client when he was called, he left the queſtion to the jury, telling them that they were bound to find for the defendant in point of law. And upon their aſking him, whether, in the event of the defendant's not being liable, any other perſon was, he told them, that was no part of their conſideration; but, being willing to give them any information, he added, that he was of opinion, that if the plaintiff's demands were juſt, his proper remedy was by a petition of right to the crown: on which they had found a verdict for the defendant.

The rule for granting a new trial was moved for, on the miſ-direction of the judge upon two points.

1ſt, That the defendant had, by his own conduct, made himſelf perſonally liable, which queſtion ſhould have been left to the jury.

2dly, That the plaintiff had no remedy againſt the crown, by a petition of right, on the

the ſuppoſition of which the jury had been induced to give their verdict.

Lord MANSFIELD, *Ch. J.* now declared, That the court did not feel it neceſſary for them to give any opinion on the ſecond ground.

His Lordſhip ſaid, that great difference had ariſen ſince the revolution, with reſpect to the expenditure of the public money. Before that period, all the public ſupplies were given to the King, who, in his individual capacity, contracted for all expences. He alone had the diſpoſition of the public money. But ſince that time, the ſupplies have been appropriated by parliament to particular purpoſes; and now, whoever advances money for the public ſervice, truſts to the faith of parliament.

That, according to the tenor of Lord *Somers*'s argument (*a*) in the banker's caſe, though a petition of right would lie, yet it would probably produce no effect. No benefit was ever derived from it in the banker's caſe, and parliament was afterwards obliged to provide a particular fund towards the payment of thoſe debts (*b*). Whether, however, this alteration in the mode of diſtributing the ſupplies, had made any difference in the law upon this ſubject, it was unneceſſary to determine; at any rate, if there were a recovery againſt the crown, application muſt be made to parliament, and it would come under the head of ſupplies for the year.

Bearcroft and *Bower* ſhewed cauſe.

They allowed that a perſon, acting in a public ſituation under government, might, by his own conduct, make himſelf perſonally liable for contracts, which, from the nature of his office, he would not otherwiſe be anſwerable for.

(*a*) Vide II. State Trials, 759.

(*b*) The ſtat. 12 & 13 W. III. c. 12. §. 15. provides, that, in lieu of the annuities granted to the bankers and all arrears, the hereditary exciſe, ſhall, after the 26th December, 1701, be charged with annual ſums equal to an intereſt of 3 per cent. 'till redeemed by payment of one moiety of the principal ſums.

for. But the plaintiff ſhould make out a very ſtrong caſe, in order to induce the court to beleive that ſuch was the agreement. As if a perſon, reſiding at a diſtance abroad, abſolutely refuſed to treat with the government, but choſe rather to rely upon the perſonal ſecurity of the governor, who was upon the ſpot, and who was willing to treat upon thoſe conditions: but they contended, in this caſe, that the defendant had acted avowedly as the agent of government, and did not intend to make himſelf perſonally reſponſible.

But conſidering this even as a common tranſaction between private parties, apart from public conſiderations, which would weigh in this caſe, the plain queſtion would be, to whom was the credit given? It appears, upon the face of it, not to have been given to the defendant. The goods furniſhed were not for his uſe, and ſo the plaintiff knew. The defendant's letter to the plaintiff, when he was appointed to the poſt, expreſsly mentions that they were for the uſe of the crown.

The orders given by the defendant were in the quality of governor, and therefore the plaintiff muſt be taken to have contracted with government. It is no anſwer to ſay, that the bills were drawn on the defendant, for that is the common courſe of buſineſs; and the letter from *Matthews*, the defendant's ſecretary, ſpeaks of an application to the treaſury, which ſhews, that it could not be conſidered as a perſonal demand on the defendant.

Suppoſing the defendant in the ſituation of a private ſteward, if it be notorious that the orders are given by him for his employer, and that he acts merely in the capacity of an agent, that is ſufficient to ſhew the nature of the

tranſaction, and to whom the credit has really been given.

In ordinary dealings, where it is a matter of doubt to whom the credit has been given, the queſtion has frequently been decided, by having recourſe to the creditor's books, or by producing his bills, and ſeeing whom he himſelf has debited. In this inſtance, the plaintiff has debited government.

Another circumſtance is here diſcloſed, which decides as to whom the plaintiff gave the credit: for he firſt applied for payment to the treaſury, and, on their refuſal, had recourſe to the defendant; which manifeſtly proves, that he looked upon government as his debtor.

They then mentioned the caſe of General *Burgoyne*, againſt whom a bill was filed in Chancery, for a ſpecific performance of a contract, for the ſupply of artillery carriages in *America*. Lord THURLOW, *Chancellor*, ſaid, that there was no colour for the demand, as againſt the defendant, who acted only as an agent for government, and diſmiſſed the bill with coſts. His Lordſhip alſo made the ſame obſervation, which the learned Judge made in this cauſe, that the plaintiff had his remedy againſt the crown by petition of right.

Cowper, *Law*, and *Adam*, in ſupport of the rule, contended, that the evidence which was produced at the trial was ſuch, as ought to have been left to the jury to determine, whether the defendant had not made himſelf perſonally liable.

In general, a commanding officer is not anſwerable for ſtores, and other articles furniſhed notoriouſly for the uſe of government; but there is no doubt that he may become ſo by his own conduct. Here the plaintiff was di-

rected by the defendant to obey the orders of Lieutenant-governor *Sinclair*. Every article which he furnished was in obedience to *Sinclair*'s commands; and *Sinclair* himself was instructed to draw bills for the payment of those articles, not on the government, or on any official paymaster, which would have afforded a strong presumption in discharge of the defendant's liability, but his orders were to draw on the defendant himself.

The partial payment which was afterwards made, was under the special directions of the defendant, who, throughout the whole transaction, exercised his own discretion, as to which part of the charges should be allowed or rejected. The defendant's own conduct, therefore, has made him personally liable.

Distance of place and situation might also have been a reason with the plaintiff, for giving the defendant personal credit: for the parties being removed so far from the seat of government at home, there was no other person to whom the plaintiff would so naturally look for payment, as the defendant himself.

The production of the letters at the trial, was an additional reason for leaving the question to the jury, whose province it was to determine the import of them.

In an action brought against General *Burgoyne*, to recover a sum of money due to the plaintiff, as provost-marshal, the defendant having promised that he should be paid at the same rate as the provost-marshal under General *Howe* had been, a similar objection to the present, was started on the trial, by Mr. *Lee*, against the legality of the action; but Lord *Mansfield* refused to nonsuit the plaintiff, upon which he went into his case;

 and

and it afterwards appeared, in the course of the inquiry, that the plaintiff's demand had been satisfied. From this it is evident, that his Lordship thought a commanding officer might make himself liable, and that whether he had, or not, was a proper subject for the inquiry of a jury.

Taking this to be the case of a factor residing abroad, who transacts business for his principal in *England*; if the former had undertaken in the same manner that the defendant has done in this case, he would have made himself personally liable, since they may both be bound.

Supposing that the articles furnished were for the use of government, that will not vary the question. A master of a ship, who contracts for necessaries for the use of the ship, is personally liable, though he is known at the time not to be the owner (*a*). At all events, if there be any difference between this case and that of agent and principal, to which the present is likened, yet every agent who personally undertakes, cannot dispute his liability:

(*a*) Cowp. 639.

The whole question, therefore, should have been left to the jury, whose conduct proved that they entertained doubts upon it, 'till they were informed that the plaintiff had his remedy against the crown.

But if there is no remedy, in the form of a petition of right against the crown, on account of the appropriation of the supplies since the revolution, and the public is to be considered as the real debtor, then there was no other person, against whom this demand could so properly be urged, as against the defen-

dant,

dant, who represented and acted as ostensible agent for the public in this transaction.

Lord MANSFIELD, *Ch. J.*—The only question before the court is, whether the *defendant* is liable or not in this action? If he is, the plaintiff must recover; if not, no consideration respecting the plaintiff's remedy against any other party, can induce the court to make him so.

There is no colour to say that he is liable in his character of commander in chief.

In a late case which was tried before me, where one *Savage* brought an action against Lord *North*, as first lord of the treasury, in order that he might be reimbursed the expences which he had incurred in raising a regiment for the service of government, I held that the action did not lie.

So in another case of *Lutterloh* against *Halsey*, which was an action brought against the defendant, who was a commissary for the supply of forage for the army, and by whom the plaintiff had been employed in that service, the commissary was held not liable.

In the present case it was notorious that the defendant did not personally contract; the plaintiff knew at the time that he furnished the stores, that they were for the use of government: and he afterwards made government debtor in his bills.

But it has been urged, that the defendant made himself liable, after the debt was contracted. In my opinion there is no ground for such an argument. The evidence does not warrant it.

Then it was objected, that whether the defendant had made himself liable or not, was a question, which ought to have been left to the jury to decide. But there was no evidence

which was proper for their consideration, for the evidence, consisting altogether of written documents and letters, which were not denied, the import of them was matter of law, and not of fact. Therefore I am of opinion that the verdict should stand.

Willes, *J.*—I think, under all the circumstances of the present case, that the defendant is not personally liable. The goods were furnished for the use of the crown: government was made debtor: and all the letters speak of the transaction, as having been considered in that light. Then if the defendant was liable, his person and property would be subject to an execution, and he must afterwards apply to government for a reimbursement, which would be no satisfaction to him, for the inconvenience he had been put to.

The letter from defendant's secretary shews, that what he did was under the direction of government, and that the fund, out of which the plaintiff was to be paid, was the treasury. And though I consider the faith of government, as pledged for the acts of the defendant, yet I cannot consider him as personally answerable.

As to the objection, that this should have been left to the jury, it is decisive, that this question comes before the court on a motion to set aside the *verdict*, and not a *nonsuit*. There was no other evidence but letters, which were before the jury, and the judge had a right to give his opinion upon them. The construction of deeds is a matter of law, but that of letters is proper for the consideration of the jury.

Ashhurst, *J.*—In great questions of policy, we cannot argue from the nature of private agreements. But even in these cases, the question

question must be, what was the meaning of the parties at the time of entering into the contract?

A person acting in the capacity of an agent, may undoubtedly contract in such a manner as to make himself personally liable: and that brings it to the true question here; namely, whether, from any thing that passed between the parties at the time, it was understood by them, that the plaintiff was to rely upon the personal security of the defendant? But nothing appears from the evidence in this case, to warrant such a conclusion. Government was made debtor; and it is evident that the plaintiff looked to them for payment: for he first made application to the treasury, and his demand against the defendant was only an afterthought, when he found he could not obtain the money in any other way. Then it seems to me, that there is nothing in this transaction, to fix the defendant, or to shew that the plaintiff looked to him as his debtor, at the time that the credit was given.

Great inconveniences would result from considering a governor, or commander, as personally responsible in such cases as the present: for no man would accept of any office of trust under government, upon such conditions. And, indeed, it has frequently been determined, that no individual is answerable for any engagements which he enters into on their behalf.

There is no doubt but the crown will do ample justice to the plaintiff's demands, if they are well founded.

BULLER, *J.*—I do not agree with my brother *Willes*, as to the construction of letters. If they are written in so dubious a manner, as to

be

be capable of different constructions, and can be explained by other transactions, the whole evidence must be left to the jury, to decide upon; for they are to judge of the truth or falshood of such collateral facts, which may vary the sense of the letters themselves: but if they are not explained by any other circumstances, then, like deeds, or other written agreements, the construction of them is a mere matter of law.

In what character then, as appears from these documents, did the defendant act throughout this business? It is true, that he gave the orders to *Sinclair*, and that every thing which the plaintiff did, was pursuant to directions from the latter, whom he was instructed to obey; but these orders did not flow from the defendant in his own personal character, but as governor and agent for the public; and so the plaintiff himself considered it. And in any case where a man acts as agent for the public, and treats in that capacity, there is no pretence to say that he is personally liable.

Rule discharged.

Oswald and others, executors of Oswald, against Legh. T. 26 G. III. B. R, Durnford & East. 1 V. 270. Twenty years without any demand, is of itself a presumption that a bond has been paid. A verdict being found for the plaintiff, motion for a new trial, upon the ground that the jury should have been directed

Debt on bond by the executors of the obligee against the obligor.—Pleas—*non est factum*; *solvit ad diem*; & *solvit post diem*. This cause was tried at the sittings after last *Easter* term, before *Buller*, J. at *Guildhall*, when it appeared, that the bond was executed on the 17th *January*, 1765. That in *June*, 1784, the obligee sued out a writ upon the bond, but he died within three months afterwards, without having ever served it. That the present action was commenced last *Easter* term, That the parties were both men of fortune, residing in *England*, and had lived upon terms of

of intimacy. The jury found a verdict for the plaintiffs.

directed to have found for defendant, upon presumption of payment arising from length of time, and other circumstances. New trial refused.

Bower moved for a rule to shew cause why there should not be a new trial, on the ground that the jury should have been directed to find for the defendant, on the presumption of the bond's having been satisfied, as the parties had lived in the kingdom, and no demand had been made for nineteen years and an half. That in some cases, this presumption had arisen where demand had not been made even for a less time. In an action of debt on a bond by *Kowley* against *Tomkins* (*a*).

(*a*) Salop Summer assises, 1766.

Aston, J. mentioned the case of *Weldon* v. *Davis*, at *Guildhall*, after *Trinity*, 1760, which he said he had often heard cited by Lord *Mansfield*, where eighteen years was held sufficient to raise a presumption upon, unless some reason was assigned for not calling on the party. In that case, the case of *Moyle* against Lord *Roberts* was cited; where the plaintiff, in order to obviate the presumption, shewed two writs of *testatum capias* to have been sued out, but not served, because the party could not be found; in which last case Lord *Mansfield* said, there was no foundation for the presumption.

Buller, *J.*—I have always been of opinion, that no less time than twenty years, could of itself form a presumption that a bond had been paid; and as there was no evidence at the trial in aid of the presumption, I left the question to the jury, with strong directions in favour of the plaintiffs; for even with regard to the rule of twenty years, where no demand has been made during that time, that is only a circumstance for the jury to found a presumption upon, and is in itself no legal bar. In those cases, where satisfaction of a bond

has

has been presumed within a less period, some other evidence has been given in favour of such a presumption, such as having settled an account in the intermediate time, without any notice having been taken of such a demand.

It is manifest that this doctrine of twenty years presumption, was first taken up by Lord *Hale*, who only thought it a circumstance from whence a jury might presume payment. In this he was followed by Lord *Holt*, who held, that if a bond be of twenty years standing, and no demand proved thereon, or good cause of long forbearance shewn, on *solvit ad diem*, he should intend it paid (*b*).

(*b*) 6 Mod. 22.

This doctrine was afterwards adopted by Lord *Raymond*, in the case of *Constable* v. *Somerset* (*c*): that was debt upon bond, where the defendant, an executor, craved oyer of the bond, and of the condition, which appeared to be for the payment of so much money, six months after the death of the defendant's testator. The defendant, in his plea averred, that the testator died on the 15th *March*, 1711, and that he had paid the said sum on the 16th *March*, 1711, within six months after the testator's death, and thereupon issue was joined.

(*c*) Hil. 1 G. II. at Guildhall.

The defendant relied on the ground that, as he, after the death of the testator, his father, had an estate in the plaintiff's neighbourhood, and was constant and regular in all his payments, it should be presumed that the money was paid to the plaintiff. In answer to this objection, evidence was given of a demand of the money on the defendant himself in 1725; and the Chief Justice said, that the presumption of money having been paid, which was due on bond, if it were put in suit after twenty years standing,

ſtanding, was not the old, but a new doctrine, which had been introduced in Lord *Hale*'s time, and that he would never ſuffer a plaintiff to be *ſtripped* of a juſt debt, by ſuch a preſumption as was then contended for.

This opinion ſeems to fortify the idea which I took up at the trial, in anſwer to a *dictum* which was then cited (*a*), that the queſtion of preſumption of payment within a leſs time than twenty years, had been left to a jury, which was, that it muſt have been left to them upon ſome evidence; and in ſuch caſes the ſlighteſt evidence is ſufficient. In one of the *Winchelſea* caſes (*b*), Lord *Mansfield* expreſsly ſaid, that if a bond had lain dormant for *twenty years*, it ſhall be preſumed to be paid.

(*a*) 1 Burr. 434.

(*b*) 4 Burr. 1962.

The court, however, inclining to believe that the real truth of the caſe was with the defendant, deſired that he would make an affidavit; which being read upon a ſubſequent day, and not proving ſatisfactory, they

Diſcharged the rule.

And Lord Mansfield, *Ch. J.* ſaid, that there was a diſtinction between length of time as a *bar*, and where it was only *evidence* of it: the former was poſitive, the latter only preſumption; and he believed that in the caſe of a bond, no poſitive time had been expreſsly laid down by the court; that it might be eighteen or nineteen years.

Patman v. Vaughan. H. 27 G. III. B. R. Durnford & Eaſt. I V. 572.
An inn-keeper who ſells liquor out of the houſe to all cuſtomers that apply for it, is ſubject to the bankrupt

The plaintiff, who was an inn-keeper, brought this action againſt the defendant for ſeiſing and taking his goods. The defendant pleaded the general iſſue, and proved that he took the goods as meſſenger under a commiſſion of bankrupt. And the queſtion was, whether the plaintiff was a trader?

Upon

bankrupt laws; however inconsiderable the extent of such dealing, and the profits arising from it, may be. It was left to the jury whether the plaintiff had endeavoured to make a profit of his trading, and was ready to sell to any who applied, and not merely as a matter of favor, and that then the quantum and extent of trading was immaterial, and they found for the defendant, which the jury did. Motion for new trial, on the ground that the direction was contrary to law, or the finding of the jury contrary to evidence. New trial refused.

Upon the trial before *Buller*, Justice, at the sittings after last term for *Westminster*, it appeared in evidence, that the plaintiff had kept a public-house for nine months, during which time he had sold to three or four persons about six gallons of spirits altogether. One of the instances was, that, having bought five gallons of spirits of one *Bennett*, he had desired him to send two of the five into the country, to a person who had ordered it of him. It was also said by his own servant, that if any person had sent for liquor, he might have had it. The learned judge left the question to the jury, with this direction, that if they were of opinion that the plaintiff had endeavoured to make a profit of his trading, and was ready to sell to any person who applied to him, and not merely as a matter of favor, that then the *quantum* and extent of the trading was immaterial, and they should find for the defendant. The jury having found for the defendant accordingly;

Erskine now moved for a rule, to shew cause why there should not be a new trial, on two grounds; either that this was a direction contrary to law; or that the finding of the jury was contrary to evidence. After observing, that, in order to subject a man to the bankrupt laws, it was necessary by the 21 *Jac.* I. *c.* 19. that he should seek his living by trading; and that whether the facts found amounted to a trading, was a question of law (*a*); he stated the question to be, whether in point of law, the proportion of the plaintiff's trading out of the house, was sufficient to make him a bankrupt. He admitted that, if the *quantum* of his trading was in proportion to his usual and principal business, he was liable to the bankrupt laws; as in the case of *Mayo* and *Archer* (*b*), but

(*a*) Cowp. 745.

(*b*) 1 Stra. 513.

but he contended that in the present case, the *quantum* of the plaintiff's dealing bore no such proportion. That it had always been considered 'till very lately, that the *quantum* of the trading was material. It was so laid down by Lord Chief Baron *Parker*, in *Buscall* v. *Hogg* (*c*), where the instances of trading of one *Thickpenny*, an inn-keeper, were much more numerous and stronger than the present: and though the court afterwards set aside the nonsuit in that case, yet it was because it did not appear to them, what proportion the trade in his inn bore, to his trading abroad, and out of doors. And *Wilmot, Ch. J.* said, "that "if *Thickpenny*'s trade and profits in his inn, "were much larger than his trade and profits "abroad out of his inn, he should not think "him liable to the bankrupt laws." The distinction seemed to be this, that wherever a man follows one trade only, though his dealing be ever so small, he is liable to the bankrupt-laws. But where he has another mode of getting his livelyhood, and his trading is only collateral, and bears but a small proportion thereto, in that case the law will not raise a presumption that he seeks to get his living by it. If that were so, either the learned judge's direction to the jury was wrong, or they have found a verdict not warranted by the evidence.

(*c*) 3 Wils. 146. Vide post IX. (16.)

Ashhurst, J.—I do not now consider the question of law to be governed by the *quantum* of the trading: but I take the rule to be this, that where it is a man's common or ordinary mode of dealing, or where, if any stranger, who applies, may be supplied with the commodity in which the other professes to deal, and it is not sold as a favour to any particular

person,

person, there the person so selling, is subject to the bankrupt laws.

Buller, J.—The case of *Bartholomew* v. *Sherwood* (a), was much stronger than the present. On the trial of this cause I left the question to the jury, with this direction, that if they were of opinion that the plaintiff meant to sell spirits out of his house, and to get a profit by it, the quantity which he sold was immaterial, and he must be considered as a trader. It was proved at the trial, that the plaintiff lived in the public-house only nine months, during the course of which time, there could not be many instances adduced in evidence of his having sold spirits out of the house: but I particularly directed the jury to advert to the circumstance, of there not being any one instance of any person, who had applied to buy liquor, having been refused. That is the great point; for as to the extent of the dealing, and the profit which he made, it is immaterial: for if a man makes a considerable profit, he is not likely to become a bankrupt; it is only in cases where the profits of the trade are inconsiderable, that such an event is likely to take place. Now the circumstances here were, that from the time when the plaintiff took this house, he was willing to sell spirits to any person who applied: therefore, though the time was short, and the instances of his trading were few, yet I thought it proper to be left to the jury: and they found a verdict for the defendant.

(a) Vide at the end of the case.

Rule refused.

(a) *Bartholomew* and another, assignees of *Davis*, against *Sherwood*, *M.* 27 *Geo. III. B. R.*

This was tried before Mr. Baron *Eyre*, at the Summer assises at *Oxford*, 1786. The plaintiffs,

(a) Willett v. Hudson. E. 26 Geo. III. B. R. S. P. The question here was, if a farmer had dealt in

plaintiffs, as assignees, brought an action of trover against the defendant, who claimed under an execution against the goods of the bankrupt.

in horses in such a manner as to make him a trader.

The only question was, whether *Davis*, the supposed bankrupt, was a trader, within the meaning of the statutes concerning bankrupts. It was contended that he was a dealer in horses: as to which it appeared in evidence, that *Davis*, at this time, and for a few years past, had rented a considerable farm at *Whitchurch*; and that he kept two, and occasionally three teams of horses, for the farming business. That previous to his taking this farm, he had lived with an uncle, during which time he attended several different fairs, and occasionally bought and sold horses; that after he took this farm, there were several instances of his attending fairs, and of every now and then buying a horse, which was not calculated for the farming business, and which he constantly sold again. It appeared, that during the course of two years, he had bought and sold five or six horses in this manner, two of which had been sold directly after he had bought them, for the sake of a guinea profit, and another was sold again within three days. No evidence being offered to contradict this on the part of the defendant, the judge left it to the jury on the plaintiff's evidence, and they found a verdict for the plaintiff.

A motion was made for a new trial last *Michaelmas* term, which, after argument, was refused. And

Ashhurst, *J.* said, It is admitted on the part of the defendant, that this was a matter of evidence, and proper for the consideration of the jury. Then if it were proper to be left

to them, and there was no evidence to contradict it, they were bound to find as they did. The general principle is right, that a farmer, as such, is not an object of the bankrupt laws; and if a farmer, in the course of his business, buys a horse, and after using him for some time, sells him again, that will not subject him to the bankrupt laws. But in this case the evidence is, that he bought horses for the express purpose of gaining by it.

Buller, *J.*—It appears upon the evidence, that there were many instances of the bankrupt's buying horses which he could not use in his farming business, and others which he bought for the express purpose of selling again. Whether there were more or fewer instances, was proper to be left to the consideration of the jury.

It is like the case of a vintner, who if he sell only a few dozen of liquor to particular friends, cannot be made a bankrupt; but if he is desirous to sell to every person who applies, that will subject him to the bankrupt laws. But in all these cases the question is, whether the person buys and sells with a view to make a profit by it; and that is proper to be left to the consideration of the jury. Here it was left to them, and they have found that *Davis* was a trader.

Rule discharged.

Borthwick v. Carruthers. E. 27 G. III. B. R. Durnford & East. f V. 648.
If plaintiff reply to a plea of infancy, that defendant, after he attained 21, confirmed the promise, and defendant rejoin that he did not; plaintiff

To an action for goods sold and delivered, the defendant pleaded, amongst other things, infancy. The plaintiff replied, that after the defendant had attained his age of twenty-one years, he ratified and confirmed the several promises and undertakings, *&c.* To this the defendant rejoined, that he did not, after he had attained his age of twenty-one years, ratify and confirm the promises, *&c.* and thereupon issue

issue was joined. On the trial before *Buller*, J. at the last sittings at *Westminster*, the plaintiff proved a promise by the defendant, and rested his case there. The counsel for the defendant contended that the plaintiff had not proved the whole of his replication; for that it was incumbent on him to shew that the defendant was of age at the time when the promise proved was made. But *Buller*, J. being of opinion that the proof of infancy lay on the defendant, within whose knowledge the fact was, and who wished to take advantage of it, the plaintiff obtained a verdict.

plaintiff need only prove a promise, and defendant must shew he was under age at the time. The judge of opinion the proof of infancy lay on the defendant, and verdict for the plaintiff. Motion for new trial, on the ground of misdirection. New trial refused.

A motion was made by *Gibbs*, to set aside the verdict and enter a non-suit, upon the ground that the plaintiff having alledged in his replication that the defendant was of age, at the time of confirming the promise, it became necessary for him to prove him to be so. That it was a material allegation to support the plaintiff's replication; and if it were necessary to alledge it, it was also necessary to prove it.

ASHHURST, *J.*—This was a fact, which, if true, rested within the knowledge of the defendant, and which it might be impossible for the plaintiff to be able to prove. In general, such a fact is proved by a copy of the register of the baptism, which the plaintiff may not know where to find; and in some instances, as in case of a private baptism, is not possibly within his power, therefore the proof of the fact lay upon the defendant.

BULLER, *J.*—I do not agree with the general position, to the extent in which it has been laid down, that the plaintiff is bound to prove every thing that he alledges. For in actions on the game laws, although it is necessary to alledge, that the defendant was not qualified,

 yet

yet the plaintiff need only prove the offence, and then, if the defendant is really qualified, it is incumbent on him to ſhew it.

In the preſent caſe, the defence ariſes from a perſonal incapacity to contract, which lies only within the defendant's knowledge, and which, therefore, he ought to prove.

Grose, *J.*—It was ſufficient in this caſe for the plaintiff to prove the promiſe; and it was incumbent on the defendant to prove infancy, if he had meant to take advantage of it; for it is to be preſumed that when a man contracts, he is of proper age to contract, until the contrary be ſhewn.

Rule refuſed.

Doe, on the demiſe of Freeland, v. Burt. E. 27 Geo. III. B. R. Durnford & Eaſt. 1 V. 701. A demiſe of premiſes in Weſtminſter, late in the occupation of A. particularly deſcribing them, part of which was a yard, does not paſs a cellar ſituate under that yard, which was then in the occupation of B. another tenant of the leſſor. And the leſſor, on an ejectment brought to recover the cellar is not eſtopped by his deed from going into evidence, to ſhew that the cellar was not intended to be demiſed. Motion for a non-ſuit to be entered, upon the ground that the

Ejectment, for a cellar and wine vaults, in *Weſtminſter*, tried before *Buller*, at the ſittings after laſt term. The defendant claimed under a leaſe from the leſſor of the plaintiff, of certain parts of a meſſuage, ſituated on the weſt ſide of *Swallow-ſtreet*, deſcribed to be one room on the ground-floor, and a cellar thereunder, and a vault contiguous and adjoining thereto; and three rooms, together with the ground whereon the ſame now ſtand, and together with a piece of ground on the north ſide, particularly deſcribing it, with an exception of a right of way. It was admitted that the vault in queſtion was under this piece of ground, which was a yard, and the whole were deſcribed to have been late in the occupation of *A.*

The defendant reſted his title on the maxim that *cujus eſt ſolum, ejus eſt uſque ad cœlum & ad inferos.* The leſſor of the plaintiff offered evidence to ſhew that at the time of the leaſe the cellar in queſtion was in the occupation of *B.* another tenant: and therefore that it could

could not have been the intention of the parties that it ſhould paſs by the leaſe to the defendant; and that the defendant had not claimed it, 'till after the expiration of that leaſe. The defendant's counſel objected to this evidence, becauſe the leſſor of the plaintiff was eſtopped by his deed, from ſaying it was not meant to paſs. But *Buller*, *J.* was of opinion that the evidence was admiſſible; and the plaintiff obtained a verdict, with liberty to the defendant to enter a non-ſuit, if the objection was well founded.

the judge had permitted evidence that was not admiſſible. Rule refuſed.

Mingay now ſhewed cauſe againſt a rule for entering a non-ſuit. The evidence offered was not contradictory to, but in explanation of the deed. It is evident that it was not the intention of the parties, that the cellar ſhould paſs by the defendant's leaſe, becauſe every thing which was intended to be leaſed, was particularly deſcribed, and no notice is taken of the cellar. And the leſſee enjoys premiſes which anſwer to every part of the deſcription in the leaſe. Beſides the premiſes intended to be demiſed, are deſcribed as late in the poſſeſſion of *A.* and this cellar was in the occupation of *B.* According to the deſcription of the premiſes, therefore, the defendant has no claim to the cellar, unleſs he is intitled by the ſtrict operation of law, for want of an exception of that, which was not intended to be leaſed. And it is to be conſidered, that in *London* and *Weſtminſter*, it is not unuſual for landlords to let the buildings above ground to one tenant, and thoſe underneath to another; ſo that the ſtrict rule of law cannot be applied to caſes like the preſent. But a farther argument alſo ariſes from the circumſtance of the cellar being in leaſe to another perſon, at the time when the

defendant's leafe was granted; fo that the leffor of the plaintiff could not have granted it, even if he had wifhed fo to do.

Bearcroft and *S. Heywood*, *contra*.

The leffor of the plaintiff is eftopped by his own deed, from recovering thefe premifes, for he is the leffor of the defendant, as well as of the plaintiff; and whatever right any third perfon might have, he cannot difpute the defendant's title. The rule of law is clear, and the queftion is as to the application of it. The principle is, that every grantor is eftopped not only from faying that he did not grant, but that he had no eftate in the premifes. Now this ejectment is for a cellar, which is locally fituated under the ground which it is admitted was demifed to the defendant: and the leafe paffed every thing which was under it. But fuppofing the ftrict rule of law could not be applied to the prefent cafe, and that the intention of the parties could be enquired into, it is clear that the leffor of the plaintiff did not intend to except the cellar in the defendant's leafe: for whatever was intended to be excepted, is mentioned in the leafe; there being an exception of a right of way. As to the defendant's not claiming 'till after the expiration of the other leafe to *B.* that does not affift the right of the leffor of the plaintiff: for the fame queftion of law ftill arifes: and it was no objection to the leffor's granting the cellar to the defendant, becaufe it was then on leafe to *B.* for perhaps the defendant was not to take poffeffion, 'till after the expiration of the other leafe.

Ashhurst, *J.*—It appears plainly from the evidence, that this objection is againft the juftice of the cafe: for it was not in the contemplation

templation of the parties, at the time of the leaſe, to paſs the cellar; and it appears, that, for three or four years after the defendant's leaſe, the leſſor of the plaintiff received rent, from the former tenant of the cellar. The only queſtion is, whether the court are abſolutely bound, by the terms of this leaſe, to put the conſtruction on it, for which the defendant contends. Now, it ſeems to me, that the conſtruction of all deeds muſt be made with a reference to their ſubject-matter; and it may be neceſſary to put a different conſtruction on leaſes made in populous cities, from that on thoſe made in the country. We know that in *London*, different perſons have ſeveral freeholds over the ſame ſpot; different parts of the ſame houſe are let out to different people. That is the caſe in the inns of court. Now it would be very extraordinary to contend, that, if a perſon purchaſed a ſett of chambers, then leaſed them, and afterwards purchaſed another ſett under them, the after-purchaſed chambers would paſs under the leaſe.

In the preſent caſe, conſidering the nature of this property, it was proper to let in evidence, to ſhew the ſtate and condition of it at the time when the leaſe was granted.

Prima facie, indeed, the property in the cellar would paſs by the demiſe; but that might be regulated and explained by circumſtances: therefore I am of opinion, that, conſidering all the circumſtances of this caſe, it was proper to receive the evidence offered at the trial, which, when received, proved that the cellar was not intended to be paſſed by the demiſe to the defendant.

BULLER,

Buller, *J.*—Where there is a conveyance in general terms, of all that acre called *Black-acre*, every thing which belongs to *Black-acre* paſſes with it.

And there the rule, which has been mentioned, *primâ facie* obtains. But whether parcel or not of the thing demiſed, is always matter of evidence. Suppoſe the premiſes in queſtion had been the inheritance of another perſon, at the time of this demiſe, inſtead of their being in leaſe, they clearly would not have been parcel of this demiſe. Then their being in leaſe to another perſon, under this plaintiff, cannot vary the queſtion, whether parcel or not. In the next place, it is very clear, on inſpecting the leaſe itſelf; theſe words cannot receive the general conſtruction of the law. This is a leaſe of a part of a meſſuage, conſiſting of one room on the ground-floor, *with a cellar thereunder:* now, if the argument for the plaintiff would hold, the cellar would have paſſed with the room on the ground-floor, without particularly ſpecifying it. Then a deſcription of another part of the premiſes is, "of ground, together with three rooms which "ſtand on it:" which ſhews that the parties have particularly deſcribed every thing which was intended to paſs. Then follows a demiſe of the yard deſcribed, with the ſame particularities, ſpecifying the abuttals and the dimenſions.

Grose, *J.*—This is a demiſe of premiſes in *Weſtminſter*, and the queſtion is, whether it appears to have been the intention of the parties to demiſe this cellar. But every thing which was meant to be demiſed is particularly deſcribed in the leaſe, and no notice is taken of this. It might as well be contended, that

a leaſe

a leafe of an houfe in the *Adelphi*, would pafs the warehoufes underneath. But it would be the greateft injuftice to put the general conftruction of law, on grants of the houfes in that building; for we all know that thofe houfes are held under titles intirely diftinct from the cellars and warehoufes underneath. And here the premifes demifed are defcribed to have been lately in the occupation of *A*. And if the parties had intended that this cellar in queftion fhould have paffed, it would have been defcribed as being in the poffeffion of *B*. But this cellar not being a part of the premifes, nor appurtenant to them, did not pafs under this leafe.

Rule difcharged.

Goodtitle, on the demife of Eftwick, againft Way, E. 27 Geo. III. B. R. Durnford and Eaft, 1 V. 735. A paper containing words of prefent contract, with an agreement that the intended leffee fhould take poffeffion immediately, and that a leafe fhould be executed in future, operates only as an agreement for a leafe, and not as a leafe itfelf; and therefore it need not be ftamped, if executed before 23 G. III. c. 58. The truftee of a term to fatisfy creditors, not having notice of an agreement for a

UPON a motion for a new trial, where *Bearcroft*, *Bower*, and *Milles*, argued for the defendant, and *Plumer* for the leffor of the plaintiff, the court took time to confider, and now

ASHHURST, *J.* delivered the opinion of the court as follows:

This was an ejectment brought by the leffor of the plaintiff, claiming under a demife made by Lord *Abingdon* to him, by deed, dated in 1784, where the truft of the term was for the benefit of creditors. The defendant claimed under a leafe, as it was opened by the defendant's counfel, (at the laft *Oxford* affifes, before *Grofe*, J.) dated in 1779; which was prior in point of time to the demife to the leffor of the plaintiff. The agreement, when produced in evidence, appeared to be on paper unftamped, and not under feal; it imported to be articles of agreement between Lord *Abingdon* and the defendant's father, by which Lord *Abingdon*, in confideration of a fum of money to

a leaſe, before the grant of the term, may maintain an ejectment againſt the tenant in poſſeſſion, under the agreement. A leaſe in writing, though not under ſeal, cannot be given in evidence, unleſs it is ſtamped. Whether the judge was right or wrong in his opinion, the defendant not being able at law to make a defence, the court refuſed a new trial.

to be paid by *Way*, ſold him the goods in his houſe at *Rycot*. The ſubſequent part of the agreement was as follows: "And further the
" ſaid Earl of *Abingdon* doth hereby agree to
" lett, and the ſaid *Richard Way* agrees to
" rent and take for the term of ſeven, four-
" teen, or twenty-one years, in caſe the ſaid
" Earl ſhall ſo long live, at and for the rent
" of 1,400 *l.* a year, to be paid half-yearly, (the
" ſaid Earl to pay or allow all manner of tithes
" and taxes, both ordinary and extraordinary,)
" all his eſtate, *&c.* at *Rycot*. It is agreed
" the ſaid *Richard Way* ſhall enter upon all the
" ſaid premiſes *immediately*, but not commence
" payment of rent until *Lady-day* next. It
" is further agreed, that leaſes with the uſual
" covenants ſhall be made and executed
" by the parties, on or before *Michaelmas*
" next."

On the production of this, it was contended, that this being produced as a leaſe, and not being ſtamped, it could not be read in evidence; and, the judge being of that opinion, the cauſe was not further gone into, and the plaintiff had a verdict. A motion has been made for a new trial, on the ground that this was not in fact a leaſe, though it was ſo opened by the defendant's counſel, but only an agreement. On the part of the plaintiff, it was contended, that this is a leaſe, being by words *de præſenti*; for which was cited *Proſſer* v. *Philips*, at *Niſi Prius*, before Mr. Baron *Perrot*; or taking it not to be a leaſe, but only an agreement for a leaſe, then it gave the defendant only an equitable title, which cannot be ſet up in a court of law againſt the plaintiff, who has a legal title. So that either way the verdict was right.

On

On the part of the defendant it was contended, that though, in common parlance, this may be termed a leaſe, it is in law only evidence of a parol demiſe, it not being under ſeal, and that being only matter of evidence, it need not be ſtamped. And as to the other objection, they anſwer, that the defendant's agreement is prior to the demiſe to the plaintiff; and that they could have proved that the plaintiff, at the time of the defendant's title, knew of the demiſe to him; and that the conveyance to him being a voluntary conveyance, he ſtands in the place of Lord *Abingdon*, and muſt be conſidered as a truſtee for the defendant; and the court will not permit him to bring an ejectment againſt his *ceſtui que truſt*. As to the queſtion whether this is or is not a leaſe, we are all of opinion, that this is not a leaſe (*a*). The caſe in *Noy* 128, of *Sturgeon* and *Paynter*, is in point. In the preſent caſe, there is alſo an expreſs ſtipulation that leaſes ſhould be drawn before *Michaelmas*; therefore, it plainly was not the intention of the parties that ſuch agreement ſhould operate as a leaſe; but only that it ſhould give the defendant a right to the immediate poſſeſſion, 'till the leaſe could be drawn. Had it been a leaſe, and as ſuch it was offered in evidence, we think that the determination was right, that it ought to be ſtamped. For as to the argument, that the word *leaſe* is inſerted in the Stamp Act amongſt other inſtruments, which are all ſpecialties, and therefore that it ſhall not be intended that the legiſlature meant to include leaſes not by deed, we do not think any ſuch intention can be inferred. The only object of the legiſlature was, to raiſe a revenue from certain things

(*a*) Vide Cro. El. 33. 486.

enu-

enumerated. There is no reaſon why one of the things ſhould be charged rather than another. It is matter of mere poſitive inſtitution; and, as it falls within the words, there is nothing in the nature of the thing to take it out of them. But if we thought that this had been a ſurpriſe upon the defendant, and that, by granting a new trial, we could enable the defendant to make uſe of this paper, as an equitable agreement, and to ſet it up as a valid objection, to preclude the plaintiff from bringing his ejectment, we perhaps ſhould not refuſe it.

The ground on which the defendant reſts his title is this: it is ſaid that the leſſor of the plaintiff only repreſents Lord *Abingdon*, it being a voluntary conveyance, and is to be conſidered as a truſtee for the defendant, and as ſuch he ſhall not bring an ejectment againſt his own *ceſtui que truſt*. If we were to decide that, it would be going a great deal further than has ever yet been done. The only cases, where this principle has been adopted, are, where the leſſor of the plaintiff has been clearly and unequivocally a truſtee for the defendant; and it would have been of courſe, for the court of Chancery to have decreed a conveyance to him. It is not neceſſary for us to ſay, what a court of Chancery might do in the preſent caſe. But thus much we may ſay, that it is not a mere voluntary conveyance to the leſſor of the plaintiff. It is made to him as a truſtee, for the benefit of creditors; and it is the ſame as if a mortgage had been made to any individual creditor, and he had brought the ejectment. In that caſe, it might perhaps be contended, that, as each party had an *equitable claim* upon Lord *Abingdon*, whoever *firſt*

got the legal title to the eſtate, ought not to be diveſted of it by a court of equity. But we do not mean to give any opinion as to this. It is enough for us to ſay, that this being at leaſt a doubtful equity, which the defendant ſets up againſt a legal title, this court, or a Judge at *Niſi Prius*, would not, and ought not, to interpoſe; and, therefore, it would be nugatory to ſend it down to a new trial.

Rule diſcharged.

Edmonſon v. Machell, T. 27 Geo. III. B. R. Durnford and Eaſt, 2 V. 4. Where a new trial is moved for, on the ground of a miſ-direction in point of law, if the court ſee that juſtice has been done between the parties, they will not ſet aſide the verdict, nor enter into a diſcuſſion of the queſtion of law.

On a motion for a new trial, Mr. Baron *Perryn*, before whom the cauſe was tried at the laſt aſſiſes at *Lancaſter*, reported, that this was an action of treſpaſs, for aſſaulting and beating the plaintiff's niece, *per quod ſervitium amiſit*. The niece lived with her aunt in *Lancaſter*, as her ſervant; her mother lived in a different part of the ſame county; and, by permiſſion of the plaintiff, the niece went, in the month of *March* laſt, to ſee her mother; at which time the aſſault was made. The caſe proved on the part of the plaintiff, was aggravated with many circumſtances of ill treatment, (which were particularly related in the detail of the evidence.) Another cauſe ſtood next in the paper for trial, which was brought by the niece againſt the ſame defendant, for the ſame aſſault. The counſel for the plaintiff declared their intention of not trying that cauſe, and withdrew the record. The defendant's counſel contended, that the jury could only give damages, in this cauſe, for the loſs of ſervice; the plaintiff's counſel inſiſted on the contrary. The learned Judge thought the aunt, in this caſe, ſtood in *loco parentis*; and as in actions brought by a father for deflowering his daughter, whereby he loſt her ſervice, large damages had been often given, he thought

 this

this caſe bore an analogy to that, and that the jury, upon the whole of the caſe, had a right to give ſuch damages as they thought juſt, conſidering the ſituation and circumſtances of the defendant, who was proved to be a captain in the militia, the qualification for which was 300 l. a year. The jury, after conſideration, found a verdict for the plaintiff, damages 300 l. with which the learned Judge declared himſelf not diſſatisfied.

This application was made laſt term, on the ground of a miſ-direction to the jury. The defendant's counſel denied that they had entered into any compromiſe, to permit the jury to take into conſideration, in the meaſure of their damages, the injury which the niece herſelf had ſuſtained, and which was the ſubject of the next action, in conſideration of the plaintiff's counſel withdrawing the record in the next action. But it was admitted that the damages were not exceſſive, according to the evidence then given, if the jury could take both the actions into their conſideration at once.

After a queſtion put this day to the plaintiff's counſel, whether the niece would enter into a rule not to proceed in the action, in which ſhe herſelf which was plaintiff, was anſwered in the affirmative,

Ashhurst, *J.* ſaid, that the Judges of this court had conſulted with the reſt of the Judges on this caſe, and the reſult of their opinion was, without giving any poſitive opinion upon the queſtion of law, that this rule ought to be diſcharged. An application for a new trial, is an application to the diſcretion of the court, who ought to exerciſe that diſcretion in ſuch a manner as will beſt anſwer

the ends of juſtice. It does not require much penetration to ſee what are the ends of juſtice in the preſent caſe. It is certain that the girl herſelf ought to have ſome ſatisfaction for the injury ſhe received; and as ſhe conſents not to try her action, the queſtion is, whether juſtice has not already been done: for it was admitted at the bar, that, if the injury ſhe ſuſtained could be taken into conſideration, in this action brought by the aunt, the damages which the jury have given are by no means exceſſive. Then there does not appear to be any ground for the defendant to call on the diſcretion of the court, to ſend this cauſe down to be re-tried, on a technical objection in point of law. And all the Judges are unanimouſly of opinion, that, as complete and ſubſtantial juſtice has been done, there is no reaſon to grant a new trial.

On the plaintiff's undertaking to pay over to the niece the damages, after deducting the coſts of this action, and on the niece's undertaking not to proceed in the action in which ſhe herſelf was plaintiff, rule diſcharged without coſts.

END OF VOL. II.